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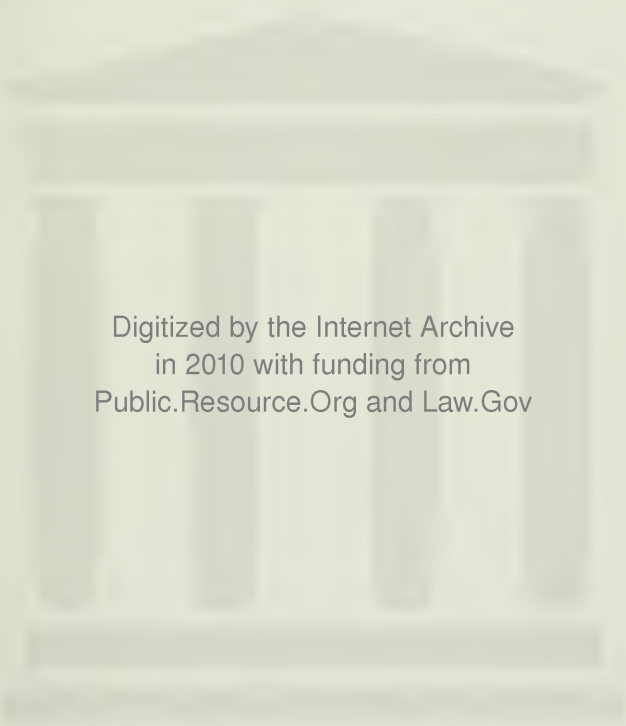
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No. 12866

2679

United States
Court of Appeals
for the Ninth Circuit.

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA and JAMES
J. BOYLE, United States Marshal for the
Southern District of California,

Appellees.

Transcript of Record

Appeals from the United States District Court,
Southern District of California,
Central Division.

FILED

DEC 6 1957

PAUL J. BARRON

No. 12866

United States
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for the Ninth Circuit.

ALLEN SMILEY,

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UNITED STATES OF AMERICA and JAMES
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

OTTO CHRISTENSEN,

JERRY GIESLER,

1212 Spring Arcade Bldg.,

541 S. Spring St.,

Los Angeles 13, Calif.

For Appellee:

ERNEST A. TOLIN,

United States Attorney,

600 U. S. Court House Bldg.,

Los Angeles 12, Calif.

At a stated term, to wit: The February Term. A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 19th day of February in the year of our Lord one thousand nine hundred and fifty-one.

UNITED STATES OF AMERICA

vs.

AARON SMEHOFF, Alias ALLEN SMILEY

Present: The Honorable Dave W. Ling,
District Judge.

MINUTE ORDER OF FEBRUARY 19, 1951
IN CASE Nos. 20069 AND 20604
No. 20,069-Cr. and No. 20,604-Cr.

On motion of Ernest A. Tolin, United States Attorney, appearing as counsel for Gov't, it is ordered that the Mandate of the U. S. Court of Appeals for the Ninth Circuit reversing the conviction on count one of the Indictment No. 20,069 and the conviction in Case No. 20,604 with directions for acquittal on said counts, and affirming the conviction on count 3 of Indictment No. 20,069-Crim., be filed and entered, and that acquittal on count one of Indictment No. 20,069-Crim., and of the charge in Case No. 20,604-Crim. be entered.

Otto Christensen and Jerry Giesler, Esqs., are present as counsel for defendant, who is [2*] present.

At a stated term, to wit: The February Term, A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 19th day of February, in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Dave W. Ling,
District Judge.

[Title of Cause.]

MINUTE ORDER OF FEBRUARY 19, 1951
IN CASE No. 20609

This cause now coming before the Court; Ernest A. Tolin, United States Attorney, appearing as counsel for Government; Otto Christensen and Jerry Giesler, Esqs., appearing as counsel for defendant, who is present.

Attorney Christensen files motion for correction or reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure and argues in support of same. Attorney Tolin argues in opposition.

It is ordered that said motion be, and it hereby is, denied.

Attorney Christensen, on behalf of Judge Keating, counsel for defendant in the immigration matters, requests that the Court make a recommendation that the defendant be not deported

because of the fact of conviction in this case, which application is denied.

It is ordered that the defendant be committed to the custody of the U. S. Marshal and his bond on appeal be exonerated.

Attorney Christensen files motion to vacate and for relief pursuant to Section 2255 of Title 28, U. S. Code, together with copy of the transcript of record on petition for writ of certiorari in the Supreme Court of the United States and copy of the opinion of the United States Court of Appeals for the Ninth Circuit in Case No. 12,375 on supplemental petition for rehearing and argues in support of said motion. Attorney Tolin argues in opposition. Court orders motion denied and that counsel prepare and submit for signature of the Court proposed findings of fact, conclusions of law, and order. [3]

At 11:10 a.m. court recesses to 2 p.m. for further proceedings.

At 2 p.m. court reconvenes herein and, all being present as before, including counsel for both sides, Attorney Tolin submits form of Findings of Fact, Conclusions of Law, and Order. Counsel discuss corrections in the form. Court signs same after corrections.

Attorney Christensen files Notice of Appeal.

Attorney Christensen moves for bail pending appeal. Court orders said motion denied. [4]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 20069

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALLEN SMILEY,

Defendant.

MOTION TO VACATE AND FOR RELIEF
PURSUANT TO SECTION 2255, TITLE 28,
UNITED STATES CODE

Comes Now the defendant and petitioner, Allen Smiley, and moves the Court for relief pursuant to Section 2255, Title 28, United States Code, upon the following grounds:

1. (a) That the sentence was imposed in violation of the Constitution, and laws of the United States;

(b) That the Court was without jurisdiction to impose such sentence; and

(c) That the evidence discloses he was not guilty of the offense charged.

2. In support of said Motion, the defendant petitioner shows unto the Court, as follows:

(a) That he is now in custody of the United States Marshal, in and for the Southern District of California, Central Division, and is being restrained illegally by virtue of a certain judgment

entered by the United States District Court, Southern District of California, Central Division; [5]

(b) That your petitioner was convicted on Counts 1 and 3 of the above-numbered indictment and on indictment No. 20604, each charging the defendant with the violation of Section 746 (a) 18, Title 8, United States Code, and sentenced by this Court to one year's imprisonment on each of said counts, said sentences to run concurrently, and to pay a fine of \$1,000.00 on each of said counts.

Said case was appealed to the United States Court of Appeals for the Ninth Circuit, and said Court reversed the judgment and sentence on Count 1 of indictment No. 20069 and the judgment and sentence of indictment No. 20604, and affirmed the judgment of conviction and sentence on Count 3 of indictment No. 20069.

That the mandate of said Court of Appeals was received by the Clerk of this Court on the . . . day of January, 1951, and the same was spread by this Court on February 19, 1951.

The opinion of said Court of Appeals is reported in 181 Fed. (2) 505, and appears on page 288 of the certified copy of the record on appeal in the above-entitled case, which is attached hereto and made a part hereof. That the Court of Appeals in its opinion reversing the judgment and sentence on each of said two counts held that evidence of a claim of birth in the United States and to having lived all of one's life in the United States was not a false representation of United States citizenship.

That in a subsequent opinion rendered by the

United States Court of Appeals for the Ninth Circuit, on January 19, 1951, on a supplemental Petition for Rehearing [a copy of which Opinion is attached hereto and made a part hereof], it was held that the third count of indictment No. 20069 upon which the petitioner stands convicted "charged the misrepresentation of citizenship to have been made to one Siu, a deputy sheriff of Los Angeles [6] County. The evidence disclosed that the false statements with which appellant was charged were made in the course of a booking operation in the sheriff's office, after an arrest. The answers were recorded on a form sheet provided for the purpose. It appears that the lower portion of the form which contains the false statement was filled in by Deputy Sheriff Hopkins, not Siu, and that Siu did not hear the false answers." The foregoing affirmative finding of fact by the Court of Appeals establishes that the evidence to sustain the count on which your petitioner stands convicted is precisely the same as was offered and received to support the above two reversed counts. Further, Siu, to whom the alleged misrepresentation of citizenship was made, testified that at another time outside of the presence of Deputy Sheriff Hopkins he asked the petitioner where he was born and how long he had lived in the United States, and that your petitioner replied that he was born in New York and had lived all of his life in the United States. Deputy Sheriff Hopkins testified that Siu was not present and had left the County Jail booking office and was not present at the time he, Hopkins, asked the peti-

tioner if he were a citizen of the United States. There was no evidence whatsoever that petitioner made any representation of United States citizenship to Siu, or that Siu was present when any representation of United States citizenship was made. That Siu was not present at the time the representation was made is clear from the record; in addition thereto, we have filed an Affidavit of said government witness, Jacob E. Siu, attached hereto, which reads as follows:

“That at no time did I ask the question appearing in Exhibit 5, ‘United States citizen?’ of Mr. Smiley, neither at the time of my interviewing him at 414½ North Hill Street, on or about the 25th [7] day of May, 1944, or later that day at the County Jail booking office in the presence of Milton S. Hopkins, Deputy Sheriff, or at any other time hear such a question put to Mr. Smiley. Neither on said day, or at any other time, did Mr. Smiley say to me that he was a citizen of the United States, nor did I hear him say so to any other person.”

Thus, the petitioner stands convicted of an offense not charged, because if he had been acquitted on the Siu count he could, nevertheless, have been charged with misrepresentation of citizenship to Hopkins and convicted.

Wherefore, petitioner prays this Honorable Court to vacate and set the judgment aside and discharge petitioner, or grant him a new trial, and for such other and further relief as may seem meet and appropriate, and in support of said Motion shall

rely upon the said Motion, and the files and records of the case which by reference are made a part hereof.

/s/ ALLEN SMILEY,
Petitioner.

OTTO CHRISTENSEN, and
JERRY GIESLER,
By /s/ OTTO CHRISTENSEN,
Attorneys for Defendant.

Allen Smiley, being sworn, states that the foregoing, signed by him, is true.

/s/ ALLEN SMILEY.

Subscribed and sworn to before me this 19th day of February, 1951.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court.

By /s/ THEODORE HOCKE,
Deputy. [8]

EXHIBIT A

United States Court of Appeals
For the Ninth Circuit

No. 12,375

ALLEN SMILEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Jan. 19, 1951

On Supplemental Petition for Rehearing and
Motion to Remand

Before: Denman, Chief Judge; Stephens and Orr,
Circuit Judges.

Orr, Circuit Judge:

OPINION

This court has rarely, if ever, been asked to entertain a proceeding of this character. We do not wish to be understood as giving it our stamp of approval as a regular practice because such a practice would be sanctioning one more step in the almost interminable delays which attend some criminal proceedings. Because of the contention that the crime charged in the indictment was separate and distinct from that upon which appellant was tried and convicted and that appellant was not aware of the

variance until a very late date, we deem it expedient to entertain the supplemental petition. Here we have a case where a conviction was had in the trial court, an appeal taken to this circuit court, the judgment affirmed, a rehearing denied; a petition to the Supreme Court of the United States for certiorari; the petition denied; a rehearing asked and denied, and now a supplemental petition to this court for rehearing and motion to remand.

The petition for rehearing presented to the Supreme Court of the United States asserted, for the first time, the contention now made to us in the supplemental petition. Appellant Smiley was [9] convicted in the District Court of the United States, Southern District of California, Central Division, of fraudulently representing himself as a citizen of the United States. He was convicted on three counts. On appeal we reversed as to two and sustained the third.

The third count charged the misrepresentation of citizenship to have been made to one Siu, a deputy sheriff of Los Angeles, California. The evidence disclosed that the false statements with which appellant was charged were made in the course of a booking operation at the Sheriff's office, after an arrest. The answers were recorded on a form sheet provided for that purpose. It appears that the lower portion of the form which contains the false statement was filled in by Deputy Sheriff Hopkins, not Siu and that Siu did not hear the false answers. Hence, it is argued that a fatal variance exists between the allegation and proof.

Deputy Sheriff Siu made an affidavit after trial as to the circumstances.

At the trial counsel for appellant relied on the theory that no crime had been committed because the person to whom the false misrepresentations were made was not one having a legal right to ask the questions in furtherance of official authority and authorized by a law which imposed a duty on the questioned individual to answer. We rejected this theory but mention it in connection with our required inquiry as to whether the alleged variance is material and of a character which could have misled the defendant at the trial and thus deprived him of a substantial right and the further inquiry as to whether appellant has been protected against another prosecution for the same offense. The true inquiry is not whether there has been a variance but was it such as to affect the substantial rights of the accused. *Berger v. United States*, 295 U.S. 78, 82; *United States v. Regan*, 314 U.S. 513, 526. "No variance ought ever to be regarded as material where the allegation and proof substantially correspond, or where the variance was not of a character which could have misled the defendant at the trial." *Washington & Georgetown R. Co. v. Hickey*, 166 U.S. 521, 531. In a criminal case there must "be added the further requisite that the variance be not such as to deprive the accused of his right to be protected against [10] another prosecution for the same offense." *Berger v. United States*, *supra*, p. 83.

Rule 52(a) of the Rules of Criminal Procedure

provides: "Any error, defect, irregularity, or *variance* which does not affect substantial rights shall be disregarded." Emphasis added. This provision is said to restate the prior law. In the instant case we have a variance in names. Not every such variance is fatal. *Ex Parte Hull*, 312 U.S. 546; *Bennett v. United States*, 227 U.S. 333; *Ferrari v. United States*, 9 Cir. 169 F. 2d 353.

Measuring the situation in the instant case by the yardstick announced in the cited cases, we find no fatal variance. The entire proceeding relating to giving of the false answer to the deputy sheriff, was carried on in a room in which Deputy Sheriff Siu was present most, if not all, of the time. The document upon which the alleged false answer of appellant was recorded was in evidence at the trial. It would be idle to say that the able counsel representing appellant was not advised of the entire circumstances of the making of the answer if not of the particular party to whom made. He was not concerned so much with that phase of the case because of his conception of the law. It is evident that the same defense would have been made had Hopkins been named in the indictment. As an evidence of how little concern counsel for appellant placed on the particular individual in the Sheriff's office to whom the alleged statements were made, we cite his statements to the trial court in argument for a new trial. In explanation as to why the appellant was not called as a witness, counsel stated:

"The facts are so simple in the case. In fact, we did not dispute them, stipulating that he was an

alien, and, secondly, virtually admitting that on the occasions of his interviews by booking officers . . . that he was asked certain questions with reference to his birth, . . . it was for that reason, Your Honor, that I did not place the defendant on the stand, because, if he had been, he would testify precisely that way under oath, . . . I may have made a mistake because the jury didn't hear the sound of the voice of the defendant, but I could see no purpose because there was nothing to deny as far as the actual facts of the case were concerned." [11]

This statement of counsel, made after the trial, can be relevant only to point up the theory on which the case was tried and leaves no reason for a finding of surprise and that a different defense would or could have been urged in the event Hopkins had been named in the indictment. The evidence at the trial was in part documentary. It is of such a character as to firmly peg the crime charged to the circumstances of time and place and persons present in such a manner as to fully protect appellant against another prosecution for the same offense. He would have no difficulty were another prosecution attempted in showing former jeopardy.

The supplemental petition for rehearing is denied, as is also the motion to remand.

[Endorsed]: Opinion. Filed Jan. 19, 1951. Paul P. O'Brien, Clerk. [12]

EXHIBIT B

In the Supreme Court of the United States

No. 124

ALLEN SMILEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF JACOB E. SIU

State of California,

County of Los Angeles—ss.

Jacob E. Siu, being first duly sworn, deposes and says: That he is the Jacob E. Siu who testified as a witness on behalf of the United States of America in the case of United States v. Smiley (No. 20069);

That at no time did I ask the question appearing in Exhibit 5, "United States citizen?" of Mr. Smiley, neither at the time of my interviewing him at 414½ North Hill Street, on or about the 25th day of May, 1944, or later that day at the County Jail booking office in the presence of Milton S. Hopkins, Deputy Sheriff, or at any other time hear such a question put to Mr. Smiley; Neither on said day, or at any other time, did Mr. Smiley say to me that he was a citizen of the United States, nor did [13] I hear him say so to any other person.

/s/ JACOB E. SIU.

Subscribed and sworn to before me this 19th day of October, 1950.

[Seal] /s/ MINNIE F. CHITWOOD,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Feb. 19, 1951, U.S.D.C. [14]

[Title of District Court and Cause.]

No. 20069

FINDINGS OF FACT AND CONCLUSIONS
OF LAW CONCERNING DEFENDANT'S
MOTION TO VACATE AND FOR RELIEF
PURSUANT TO SECTION 2255, TITLE 28,
UNITED STATES CODE

Be It Remembered that on the 19th day of February, 1951, at the hour of 10 o'clock a.m., defendant, present in court with his counsel, Otto Christensen, Jerry Giesler and Frank Desimone, filed his motion designated Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code;

Whereupon, the following proceedings were had, Honorable Dave Ling, Judge of this Court, presiding:

Defendant was personally present during the entire proceedings and represented by counsel above named. The plaintiff was represented by Ernest A.

Tolin, United States Attorney. Defendant called up his said motion for hearing immediately after the filing thereof, whereupon the Court received documentary evidence, to wit: A copy of an Affidavit which had been filed with the Supreme Court of the United States in connection with a petition of defendant for a writ of certiorari concerning his conviction herein. Defendant offered into evidence and the Court received a copy of the opinion of the United States Court of Appeals for the Ninth Circuit on Supplemental Petition for Rehearing and Motion to Remand. Defendant offered his verified motion and the files and records of the case. [15] Following argument and consideration thereof the Court does now find the facts to be:

1. That the sentence imposed upon defendant herein is not in violation of the Constitution and is not in violation of the laws of the United States or of any law of the United States; that the Court was with jurisdiction to impose said sentence; that the evidence discloses defendant was guilty of the offense charged.

2. It is true that defendant is now in custody of the Attorney General of the United States by his representative, the United States Marshal in and for the Southern District of California. It is true that he is being restrained of his liberty by virtue of said custody. The Court finds that said restraint is by virtue of that certain judgment entered by this Court herein which, among other things, committed the defendant to the custody of the Attorney General of the United States for the term of one

year and which is the judgment complained of in the motion respecting which these findings are made.

3. It is true that defendant was convicted on Counts One and Three of an indictment filed in this Court under the case number designated hereon and on an indictment No. 20604. It is true that each of said counts and the single count of indictment No. 20604 charged the defendant with the violation of Section 746 (a) 18, Title 8, United States Code. It is true that defendant was thereupon sentenced by this Court to one year imprisonment on each of said counts and that said sentences were ordered to run concurrently and that defendant was sentenced to pay a fine of \$1,000.00 on each of said counts. It is true that said case was appealed to the United States Court of Appeals for the Ninth Circuit and that said Court reversed the judgment and sentence on Count One of the indictment in case No. 20069, and the judgment and sentence imposed by reason of conviction of the indictment in case No. 20604. It is true that said United States Court of Appeals for the Ninth Circuit affirmed the judgment of conviction on Count Three of indictment No. 20069. It is true that defendant thereafter petitioned the Supreme Court of the United States for a writ of certiorari as to that judgment of conviction which was affirmed as aforesaid. It is true that in connection with a petition for rehearing of said petition for a writ of [16] certiorari, the defendant filed with the Supreme Court an Affidavit by one J. E. Siu and presented to that Court an argument that there had been a variance between the indictment

upon which the appellant was tried and convicted and the proof adduced at the trial. It is true that the Supreme Court of the United States denied defendant a writ of certiorari. It is true that thereafter defendant filed a Supplemental Petition for Rehearing and Motion to Remand in the United States Court of Appeals for the Ninth Circuit, wherein defendant raised in that Court the contention that there had been a variance between the Court of the indictment upon which he was convicted and the proof which had been adduced in support thereof. It is true that the opinion of the said Court of Appeals thereafter transmitted its Mandate to this Court; that said Mandate has been received and spread upon the Minutes and records of this Court. It is true that portions of the Opinion by the Court of Appeals for the Ninth Circuit on Supplemental Petition for Rehearing and Motion to Remand have not been fully set forth in defendant's motion, but that, on the contrary, portions only thereof have been copied, but a certified printed copy thereof is attached to the motion, and that said Opinion reads in full as follows: [17]

“This court has rarely, if ever, been asked to entertain a proceeding of this character. We do not wish to be understood as giving it our stamp of approval as a regular practice because such a practice would be sanctioning one more step in the almost interminable delays which attend some criminal proceedings. Because of the contention that the crime charged in the indictment was separate and distinct from that upon which appellant

was tried and convicted and that appellant was not aware of the variance until a very late date, we deem it expedient to entertain the supplemental petition. Here we have a case where a conviction was had in the trial court, an appeal taken to this circuit court, the judgment affirmed, a rehearing denied; a petition to the Supreme Court of the United States for certiorari; the petition denied; a rehearing asked and denied, and now a supplemental petition to this court for rehearing and motion to remand.

“The petition for rehearing presented to the Supreme Court of the United States asserted, for the first time, the contention now made to us in the supplemental petition. Appellant Smiley was convicted in the District Court of the United States, Southern District of California, Central Division, of fraudulently representing himself as a citizen of the United States. He was convicted on three counts. On appeal we reversed as to two and sustained the third.

“The third count charged the misrepresentation of citizenship to have been made to one Siu, a deputy sheriff of Los Angeles, California. The evidence disclosed that the false statements with which appellant was charged were made in the course of a booking operation at the Sheriff’s office, after an arrest. The answers were recorded on a form sheet provided for that purpose. It appears that the lower portion of the form which contains the false statement was filled in by Deputy Sheriff Hopkins, not Siu, and that Siu did not hear the false answers.

Hence, it is argued that [18] a fatal variance exists between the allegation and proof.

“Deputy Sheriff Siu made an affidavit after trial as to the circumstances.

“At the trial counsel for appellant relied on the theory that no crime had been committed because the person to whom the false misrepresentations were made was not one having a legal right to ask the questions in furtherance of official authority and authorized by a law which imposed a duty on the questioned individual to answer. We rejected this theory, but mention it in connection with our required inquiry as to whether the alleged variance is material and of a character which could have misled the defendant at the trial and thus deprived him of a substantial right and the further inquiry as to whether appellant has been protected against another prosecution for the same offense. The true inquiry is not whether there has been a variance, but was it such as to affect the substantial rights of the accused. *Berger v. United States*, 295 U.S. 78, 82; *United States v. Regan*, 314 U.S. 513, 526. ‘No variance ought ever to be regarded as material where the allegation and proof substantially correspond, or where the variance was not of a character which could have misled the defendant at the trial.’ *Washington & Georgetown R. Co. v. Hickey*, 166 U.S. 521, 531. In a criminal case there must ‘be added the further requisite that the variance be not such as to deprive the accused of his right to be protected against another prosecution for the same offense.’ *Berger v. United States*, *supra*, p. 83.

“Rule 52(a) of the Rules of Criminal Procedure provides: ‘Any error, defect, irregularly or *variance* which does not affect substantial rights shall be disregarded.’ Emphasis added. This provision is said to restate the prior law. In the instant case we have a variance in names. Not every such variance is fatal. *Ex Parte Hull*, 312 U.S. 546; *Bennett v. United States*, 227 U.S. 333; [19] *Ferrari v. United States*, 9 Cir. 169 F. 2d 353.

“Measuring the situation in the instant case by the yardstick announced in the cited cases, we find no fatal variance. The entire proceeding relating to giving of the false answer to the deputy sheriff was carried on in a room in which Deputy Sheriff Siu was present most, if not all, of the time. The document upon which the alleged false answer of appellant was recorded was in evidence at the trial. It would be idle to say that the able counsel representing appellant was not advised of the entire circumstances of the making of the answer if not of the particular party to whom made. He was not concerned so much with that phase of the case because of his conception of the law. It is evident that the same defense would have been made had Hopkins been named in the indictment. As an evidence of how little concern counsel for appellant placed on the particular individual in the Sheriff’s office to whom the alleged statements were made, we cite his statements to the trial court in argument for a new trial. In explanation as to why the appellant was not called as a witness, counsel stated:

“ ‘The facts are so simple in the case. In fact,

we did not dispute them, stipulating that he was an alien, and, secondly, virtually admitting that on the occasions of his interviews by booking officers . . . that he was asked certain questions with reference to his birth, . . . it was for that reason, Your Honor, that I did not place the defendant on the stand, because, if he had been, he would testify precisely that way under oath, . . . I may have made a mistake because the jury didn't hear the sound of the voice of the defendant, but I could see no purpose because there was nothing to deny as far as the actual facts of the case were concerned.'

"This statement of counsel, made after the trial, can be relevant only to point up the theory on which the case was tried and leaves no reason for a finding of surprise and that a [20] different defense would or could have been urged in the event Hopkins had been named in the indictment. The evidence at the trial was in part documentary. It is of such a character as to firmly peg the crime charged to the circumstances of time and place and persons present in such a manner as to fully protect appellant against another prosecution for the same offense. He would have no difficulty were another prosecution attempted in showing former jeopardy.

"The supplemental petition for rehearing is denied, as is also the motion to remand." [21]

4. It is not true that the defendant stands convicted of an offense not charged and the Court affirmatively finds that there was no material variance between pleading and proof, but that defendant had a full, fair trial wherein there was no denial

or infringement of any of the constitutional rights of the defendant and there was no violation or infringement of any of the legal rights of the defendant. The Court finds that the evidence adduced at the trial fully supports the judgment and that the conviction, sentence and present imprisonment of defendant are, and each of them is, lawful and proper.

Conclusion of Law

As a conclusion of law from the foregoing facts the Court concludes that the Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code, is without merit; that the defendant is properly imprisoned; that he is not entitled to be released upon any of the grounds stated in said motion, and that there are no conditions existing which entitled defendant to any of the relief described in Section 2255 of Title 28, United States Code, and that the aforesaid Motion to Vacate and for Relief pursuant to Section 2255, Title 28, United States Code, should be denied.

/s/ DAVE W. LING,

United States District Judge.

Dated: February 19, 1951.

[Endorsed]: Filed Feb. 19, 1951. [22]

In the United States District Court in and for the
Southern District of California, Central Division

No. 20069—Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALLEN SMILEY,

Defendant.

ORDER DENYING MOTION TO VACATE AND
FOR RELIEF PURSUANT TO SECTION
2255, TITLE 28, UNITED STATES CODE

Be It Remembered that the motion of defendant to vacate and for relief pursuant to Section 2255, Title 28, United States Code, came on regularly to be heard in open Court at the hour of 10:00 a.m., February 19, 1951, the Honorable Dave Ling, Judge Presiding. The Court, having received evidence and heard and considered the arguments of counsel and having made its Findings of Fact and Conclusions of Law, does now deny said Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code.

Dated: This 19th day of February, 1951.

/s/ DAVE W. LING,

United States District Judge.

Order entered Feb. 19, 1951.

[Endorsed]: Filed Feb. 19, 1951. [23]

[Title of District Court and Cause.]

No. 20069

NOTICE OF APPEAL

Allen Smiley, Sunset Plaza, Los Angeles, California, Appellant.

Otto Christensen, 541 South Spring Street, Los Angeles 13, California, and Jerry Giesler, 9200 Wilshire Boulevard, Beverly Hills, California, Attorneys for Appellant.

Offense: Appellant was convicted on July 14, 1949, on the violation of United States Code, Title 8, Sec. 746 (a) (18), on Count 3 of Indictment No. 20069.

Date of Judgment: July 25, 1949.

Judgment and/or sentence: Committed to custody of Attorney General for one year and to pay a fine of \$1,000.00.

Said appellant is now in custody of the United States Marshal, in and for the Southern District of California.

Appellant filed his Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code, which said Motion, on February 19, 1951, was denied. [24]

I, the above-named appellant, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order and Judgment of the Dis-

trict Court denying the Motion to Vacate Pursuant to Section 2255 on the grounds set forth below.

ALLEN SMILEY,

By /s/ OTTO CHRISTENSEN.

OTTO CHRISTENSEN, and

JERRY GIESLER,

By /s/ OTTO CHRISTENSEN.

Grounds:

a. That the sentence was imposed in violation of the Constitution, and laws of the United States;

b. That the Court was without jurisdiction to impose such sentence;

c. That the evidence discloses he was not guilty of the offense charged;

d. The trial court made erroneous Findings of Fact;

e. The trial court made erroneous Conclusions of Law.

OTTO CHRISTENSEN, and

JERRY GIESLER,

By /s/ OTTO CHRISTENSEN.

[Endorsed]: Filed Feb. 19, 1951. [25]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 12885—BH

UNITED STATES OF AMERICA, ex rel. ALLEN
SMILEY,

Petitioner,

vs.

JAMES BOYLE,

Respondent.

PETITION FOR WRIT OF
HABEAS CORPUS

Your petitioner, Allen Smiley, respectfully represents that he is being restrained illegally by virtue of a certain judgment entered by the United States District Court, Southern District of California, Central Division. That he is now in the custody of James Boyle by virtue of said judgment, said James Boyle being the United States Marshal in and for said District.

That your petitioner was convicted on Counts 1 and 3 of Indictment No. 20069 and on Indictment No. 20604, in the above Court, each charging the defendant for the violation of Section 746 (a) 18, Title 8, United States Code, and sentenced by this Court to one year's imprisonment on each of said counts, said sentences to run concurrently, and to pay a fine of \$1,000.00 on each of said counts.

Said case was appealed to the United States Court of Appeals for the Ninth Circuit, and said Court reversed the judgment and sentence on Count

1 of Indictment No. 20069 and the judgment and sentence of Indictment No. 20604, and affirmed the judgment of [26] conviction and sentence on Count 3 of Indictment No. 20069.

That the mandate of said Court of Appeals was received by the Clerk of this Court on the day of January, 1951, and the same was spread by this Court on February 19, 1951.

The opinion of said Court of Appeals is reported in 181 Fed. (2) 505, and appears on page 288 of the certified copy of the record on appeal in the above-entitled case, which is attached to the Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code, which is made a part hereof by reference. That the Court of Appeals in its opinion reversing the judgment and sentence on each of said two counts held that evidence of a claim to birth in the United States and to having lived all of one's life in the United States was not a false representation of United States citizenship.

That in a subsequent opinion rendered by the United States Court of Appeals for the Ninth Circuit, on January 19, 1951, on a supplemental Petition for Rehearing, it was held that the third count of indictment No. 20069 in which the petitioner stands convicted "charged the misrepresentation of citizenship to have been made to one Siu, a deputy sheriff of Los Angeles County. The evidence disclosed that the false statements with which appellant was charged were made in the course of a booking operation in the sheriff's office, after an arrest. The answers were recorded on a form sheet provided for the purpose. It appears that the lower

portion of the form which contains the false statement was filled in by Deputy Sheriff Hopkins, not Siu, and that Siu did not hear the false answers.” The foregoing affirmative finding of fact by the Court of Appeals establishes that the evidence to sustain the count on which your petitioner stands convicted is precisely the same as was offered and received to support the above two reversed counts. Further, Siu, to whom the alleged misrepresentation of citizenship was [27] made, testified that at another time outside of the presence of Deputy Sheriff Hopkins he asked the petitioner where he was born and how long he had lived in the United States, and that your petitioner replied that he was born in New York and had lived all his life in the United States. Deputy Sheriff Hopkins testified that Siu was not present and had left the County Jail booking office and was not present at the time he, Hopkins, asked the petitioner if he were a citizen of the United States. There was no evidence whatsoever that petitioner made any representation of United States citizenship to Siu, or that Siu was present when any representation of United States citizenship was made. That Siu was not present at the time the representation was made is clear from the record; in addition thereto, we have filed an Affidavit of said government witness, Jacob E. Siu, attached to our Motion pursuant to Section 2255, Title 28, United States Code, which reads as follows:

“That at no time did I ask the question appearing in Exhibit 5, ‘United States citizen?’ of Mr. Smiley, neither at the time of my interviewing him at 414½ North Hill Street, on or

about the 25th day of May, 1944, or later that day at the County Jail booking office in the presence of Milton S. Hopkins, Deputy Sheriff, or at any other time hear such a question put to Mr. Smiley. Neither on said day, or at any other time, did Mr. Smiley say to me that he was a citizen of the United States, nor did I hear him say so to any other person." [28]

The Judgment was rendered without jurisdiction and in violation of the Constitution, and laws of the United States.

Wherefore, petitioner prays that a Writ of Habeas Corpus in usual form issue, and that such other orders be entered as justice may require.

/s/ ALLEN SMILEY,
Petitioner.

OTTO CHRISTENSEN, and
JERRY GIESLER,

By /s/ OTTO CHRISTENSEN,
Attorneys for Petitioner.

Allen Smiley, being sworn, states that the foregoing signed by him is true.

/s/ ALLEN SMILEY.

Subscribed and sworn to before me this 19th day of February, 1951.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court.

[Endorsed]: Filed Feb. 19, 1951. [29]

At a stated term, to wit: The February Term, A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 19th day of February, in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Dave W. Ling,
District Judge.

[Title of Cause.]

MINUTE ORDER OF FEBRUARY 19, 1951
IN CASE No. 12885—BH

Otto Christensen and Jerry Giesler, Esqs., appearing as counsel for petitioner, and Ernest A. Tolin, United States Attorney, appearing as counsel for respondent, now come before the Court and stipulate that petition for Writ of Habeas Corpus may be submitted to Judge Ling.

Attorney Christensen makes a statement. Attorney Tolin makes oral statement of what the respondent's return would be. Attorney Tolin moves to dismiss the petition. Court grants said [30] motion.

United States District Court, Southern District
of California, Central Division

No. 12885—BH—Civil

UNITED STATES OF AMERICA, ex rel. ALLEN
SMILEY,

Petitioner,

vs.

JAMES BOYLE,

Respondent.

ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS AND DISMISSING
PETITION

The above-entitled cause having come before the Court on this 19th day of February, 1951, on the verified Petition for Writ of Habeas Corpus, Otto Christensen and Jerry Giesler, Esqs., appearing for the petitioner; Ernest A. Tolin, United States Attorney, appearing for the respondent;

The Court being fully advised in the premises and a motion having been made by the respondent to dismiss the petition,

It Is Ordered, Adjudged and Decreed that said motion to dismiss the petition be, and it hereby is, granted.

Dated at Los Angeles, California, this 19th day of February, 1951.

/s/ DAVE W. LING,

United States District Judge.

Approved as to Form under Rule 7.

OTTO CHRISTENSEN, and
JERRY GIESLER,
Attorneys for Petitioner.

/s/ ERNEST A. TOLIN,
United States Attorney,
Attorney for Respondent.

Dismissal entered Feb. 20, 1951.

[Endorsed]: Filed Feb. 20, 1951. [31]

[Title of District Court and Cause.]

No. 12,885—BH

NOTICE OF APPEAL

Allen Smiley, Sunset Plaza, Los Angeles, California, Appellant.

Otto Christensen, 541 South Spring Street, Los Angeles 13, California, and Jerry Giesler, 9200 Wilshire Boulevard, Beverly Hills, California, Attorneys for Appellant.

Appellant filed his Petition for Writ of Habeas Corpus which Petition on motion of the respondent was ordered dismissed, the order denying the Petition for Writ of Habeas Corpus being entered in Judgment Book 71 at page 101.

I, the above-named appellant, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order and Judgment of the Dis-

trict Court dismissing this Petition for a Writ of Habeas Corpus, on the following grounds:

1. That the sentence under which Appellant is now held in custody was imposed in violation of the Constitution and laws of the United States;

2. That the Court was without jurisdiction to impose the sentence under which he is now in [32] custody.

ALLEN SMILEY,
By /s/ OTTO CHRISTENSEN.

OTTO CHRISTENSEN, and
JERRY GIESLER,
By /s/ OTTO CHRISTENSEN.

[Endorsed]: Filed Feb. 21, 1951. [33]

[Title of District Court and Cause.]

No. 20069

[Motion Pursuant to Section 2255, Title 28, U.S.C.]

No. 12,885—BH

STIPULATION

It Is Hereby Stipulated by and between counsel for Allen Smiley and the respondents, the United States of America and James Boyle, United States Marshal for the Southern District of California, as follows:

1. That the two causes above be consolidated on appeal;

2. That the record on appeal shall consist of:

(a) The certified printed Transcript of Record on Appeal in Case No. 12375, the original exhibits,

and the files and records of the Ninth Circuit Court of Appeals in said case;

(b) The motion of defendant, Smiley, in the United States District Court for the Southern District of California to vacate the Judgment and Sentence of that Court pursuant to Section [34] 2255, Title 28, U. S. C., and attached exhibits; the Trial Court's Findings of Fact and Conclusions of Law in said Motion to Vacate; the Order of the Trial Court dismissing said Motion; the Court Reporter's Transcript of the proceedings on the hearing of said Motion; the Clerk's Minutes of the proceedings on February 19, 1951;

(c) The Petition for Writ of Habeas Corpus; the Court's Order dismissing said Petition; the Clerk's Minutes of the proceedings on February 19, 1951; the Reporter's Transcript of the proceedings on the hearing of said Petition;

(d) The Notices of Appeal;

(e) This Stipulation;

(f) Designation of Points Relied On.

Dated this 21st day of February, 1951.

ERNEST TOLIN,

By /s/ ERNEST A. TOLIN,

Attorney for Respondents.

OTTO CHRISTENSEN, and

JERRY GIESLER,

By /s/ OTTO CHRISTENSEN,

Attorneys for Defendant and
Appellant.

[Endorsed]: Filed Feb. 23, 1951. [35]

In the United States District Court, Southern
District of California, Central Division

No. 20,069—Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALLEN SMILEY,

Defendant.

Honorable Dave W. Ling, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Monday, February 19, 1951

Appearances:

For the Plaintiff:

ERNEST A. TOLIN, ESQ.,
United States Attorney.

For the Defendant:

OTTO CHRISTENSEN, ESQ., and
JERRY GIESLER, ESQ.

* * *

Mr. Christensen: Then I imagine the next thing, so we can qualify to file our next motion, is that—the marshal is present and may it be considered that the defendant is now in custody of the United States Marshal?

The Court: All right, the defendant will be com-

mitted to the custody of the United States Marshal.

Mr. Christensen: And may I have the defendant now be [16*] sworn to this petition by the clerk because I think it calls for it and I couldn't have him swear he was in custody until he actually was, your Honor.

The Court: Yes.

Mr. Tolin: May the clerk inquire whether he has read the entire petition which he is now asked to take an oath?

The Court: Let the record show the oath was given by the clerk.

Mr. Christensen: Now in connection with that it refers to the transcript of the record as being attached and that is the complete transcript of record of the proceedings in the trial court and the Appellate Court which has been certified by the clerk of the United States Circuit Court of Appeals.

I am using the transcript of record in the Supreme Court which contains what course was followed in the Appellate Court and I would like to file that as the reference made in the motion. And secondly I want to file the opinion on the petition for rehearing.

The Court: Do you want to argue this motion?

Mr. Christensen: May I first inquire, your Honor, is there a photostatic copy of an affidavit attached to that motion?

The Court: Affidavit of Jacob Siu.

Mr. Christensen: Yes. That is the one I had in mind, your Honor. And I believe the other refer-

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

ence was to the [17] opinion and I filed that and make it a part of this motion.

There are, of course, certain proceedings or procedure under the Act, and I am not unmindful of the fact that in view of the opinion that your Honor's hands are pretty much tied in the matter and it perhaps may be just fanning the air to argue the matter.

There is, however, one phase of it that might be discussed, not because I think it is going to affect your Honor's decision in the matter, but to point out that it is a very basic and substantial question that is involved.

Now when we raise the question on, I think it was a petition for—no, a petition for certiorari, we were not in the same situation that we are now. We now have a record and a positive record in this case by the finding of fact of the Appellate Court, and of course implemented by the Siu affidavit to this effect, that Siu did not hear nor was a representation made to him that he was a United States citizen; that all in this presence at any time that was ever stated was: "I was born in the United States and lived here all my life."

Now, let us have this thought in mind and your Honor recalls the theory upon which it was tried that that was sufficient, which with the Hopkins testimony and if I had been alert at that particular time I could have objected to that as evidence of a distinct and separate offense because [18] it was out of the presence of Siu, and it wasn't the thing that was charged. [19]

* * *

The Court: But it has been passed on by the Court of Appeals, has it not?

Mr. Christensen: That is right, it has been.

The Court: Then there is nothing for this court to do.

Mr. Christensen: I know your Honor can't, but I am going to make a motion when this is through for bail, and then I can appeal to the Court of Appeals and from there to the Supreme Court. That is the only way I can take it to the Supreme Court. That is the reason why I wanted to point those things out.

The Court: All right, we will start right now. The motion is denied. [21]

Mr. Christensen: Just a moment, your Honor. I think we should have reference to the statute—I believe it requires—let me see—“upon the motion and the files and record of the case conclusively showed that the prisoner is entitled to no relief the court shall cause notice——” you see if he comes to that conclusion, “the court shall cause notice thereof to be served upon the United States Attorney, grant an appropriate hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.”

Of course he is present and he is in court at this time, so he has all the notice that is necessary, and this, of course, may be considered the appropriate hearing upon all of the records, because we have the full record and the files of the court here, but it would still entail a finding of fact and conclusions

of law. In other words, I want it squarely so we don't get involved in some mechanics in our procedure.

If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was not authorized by law or otherwise open to collateral attack or that there has been a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack the court shall vacate and set aside the judgment and discharge the prisoner or re-sentence him or [22] grant a new trial or correct the sentence.

In other words, I am only looking to the mechanics of the statute and I think it would require findings of fact and conclusions of law, and I suppose any of us might prepare those and submit them.

I don't know when your Honor plans going back to Phoenix.

The Court: I am going back this evening. I have to try a case in Phoenix tomorrow morning.

Mr. Christensen: Well, I suppose we could get them over this afternoon.

Mr. Tolin: I will prepare them in the course of the day and get them down to your Honor.

The Court: All right. [23]

* * *

Mr. Christensen: Now, if your Honor please, the order being signed, I will then file a notice of appeal.

Mr. Tolin: Is the form of the order satisfactory, Mr. Christensen?

Mr. Christensen: Yes, the form of the order is satisfactory.

I will hand to the clerk and file Mr. Smiley's written notice of appeal, and having filed it I will now make a motion [30] as provided in the statute, your Honor, for an appeal to be taken to the Court of Appeals from the order entered on the motion as from a final judgment or application for a writ of habeas corpus, and I now renew my motion and make a motion that he be enlarged on bail pending the disposition of his appeal in the Appellate Court.

The Court: That motion will be denied.

* * *

Mr. Christensen: I think it will be stipulated by the United States Attorney that this petition for writ of habeas corpus may be submitted to your Honor; is that correct, Mr. Tolin?

Mr. Tolin: Yes.

Mr. Christensen: It refers to the previous motion under Section 2255 and by reference adopts the record of the case and the matters referred to in the motion. And as I pointed out to your Honor, it is pursued because of the doubts with reference to 2255 and under 2255 it cannot be filed and submitted until after a motion under 2255 has been made and ruled on, so it presents precisely the same situation as under 2255, and of course I submit and offer the files of the case [31] and the record made upon the motion on 2255, on this motion for or petition for habeas corpus.

Mr. Tolin: Of course, your Honor, having just been served with that petition for habeas corpus,

which has been filed with the clerk of the court, I think less than 10 minutes ago, I have not been in a position to prepare a return or Mr. Christensen a traverse to the return, so we are rather up against that problem in laying the matter before the court today.

Mr. Christensen: I thought they forwarded a copy of it to you with those other motions, Mr. Tolin.

Mr. Tolin: I received it this morning, but I have been in court all morning.

Mr. Christensen: Yes.

Mr. Tolin: On another matter, and then during the noon recess we had the question of preparing findings with respect to the motion.

Now, I don't know what you might have in mind. We are willing to do anything that will not prejudice the substantial rights of either party, but I don't want to urge them on you if the court wants to set a date for hearing of this writ. If he does, we will be prepared as rapidly as possible.

Mr. Christensen: Well, I imagine it should have a return, although I do know in some instances that courts have on the face of the petition itself acted upon the petition and [32] actually summarily denied it, but that perhaps isn't the strict practice under the Act and there should be a return.

Mr. Tolin: I shall take no advantage of the fact there is no return if you wish to offer some kind of a stipulation. I can state what the return would show.

Mr. Christensen: Well, suppose you do that; state what the return will contain.

Mr. Tolin: The return would contain a statement that the petitioner, Allen Smiley, is in custody of the Attorney General by the representative of the Attorney General, the marshal of this court, pursuant to a judgment and commitment issued by this court upon a verdict of guilty returned by a jury at the trial of United States of America, plaintiff, versus Allen Smiley, defendant, in case No. 20,069 of the District Court of the United States in and for the Southern District of California, Central Division; that the defendant in that case, the petitioner in this case, are one and the same person; that the petitioner here was convicted on July 14, 1949, in the litigation between said Allen Smiley and the United States of America to which I have just referred, of one count, violation of the United States Code, Title 8, Section 746, and that the conviction was on count three of the indictment.

That the judgment and commitment were that the defendant in that case, the petitioner here, be committed to the custody [33] of the Attorney General for one year and pay a fine of \$1,000, and that the petitioner was this day, that is to say the 19th day of February, 1951, committed by order of the court to the custody of the marshal for the execution of that sentence. That he is therefore held lawfully for the lawful purpose of execution of the sentence of imprisonment pronounced against him.

That in subsance I think would be the return.

Mr. Christensen: And as to that return I will

stipulate that the return may be considered as a written return in response to the petition for habeas corpus.

Mr. Tolin: I hope that any minor technical deficiencies might be corrected, Mr. Christensen, because we ordinarily prepare returns not on the spur of the moment on our feet in open court.

Mr. Christensen: I appreciate that, and I know the intent and purpose of making the oral return to stand in the place of a written one, and any such deficiencies you will find me ready to stipulate to and acquiesce in.

Mr. Tolin: I think both counsel are interested in getting the matter disposed of if possible today, knowing that the judge presently presiding in the court has a matter in another district to attend to, and the petitioner in this matter desires that it be disposed of today, so if the court should decide to enlarge him upon bail, as you have indicated [34] you will ask the court to do, that that may be done before nightfall.

Mr. Christensen: Yes.

Mr. Tolin: So while I do not wish to be understood as in any way encouraging any ideas of bail in this case from the Government's standpoint, we are agreeable to cutting these corners on pleadings, particularly under the circumstances that the court is familiar with the contentions and the issues that have been drawn under the pleadings and presented in the motions filed this morning for relief under 2255 of Title 28.

Mr. Christensen: That is correct, and upon that

return to the petition we offer the verified petition and also offer the files and records in the case in evidence as well as the motions and files and records made on the motion to vacate the sentence under Section 2255.

I think that completes the record.

Mr. Tolin: I have nothing to offer beyond that.
I think it does complete the record.

The Court: Do you move to dismiss the petition?

Mr. Tolin: I move to dismiss the petition.

The Court: Motion granted. [35]

* * *

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 23rd day of February, A.D. 1951.

/s/ J. D. AMBROSE,
Official Reporter.

[Endorsed]: Filed Feb. 24, 1951.

[Title of District Court and Cause.]

No. 20069—Crim. No. 12885—BH—Civil

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 35, inclusive, contain the original Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code; Findings of Fact and Conclusions of Law Concerning Defendant's Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code; Order Denying Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code, and Notice of Appeal, all in case No. 20069-Crim.; and the original Petition for Writ of Habeas Corpus, Order Denying Petition for Writ of Habeas Corpus, and Dismissing Petition and Notice of Appeal, all in case No. 12885-BH-Civil; and a full, true and correct copy of minute orders entered February 19, 1951, in both of the above-entitled causes, and the original Stipulation re record on appeal in both cases which, together with copy of the reporter's transcript of proceedings on February 19, 1951, and the copy of the Transcript of Record on Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in the case entitled Allen Smiley, Petitioner, vs. United States of America, Respondent, in the Supreme Court of the United States, which was filed as an exhibit to the Motion to Vacate, etc., pursuant to

Section 2255 of Title 28, U. S. Code, in case No. 20069, transmitted herewith, constitute the record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.40, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 24th day of February, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12866. United States Court of Appeals for the Ninth Circuit. Allen Smiley, Appellant, vs. United States of America and James J. Boyle, United States Marshal for the Southern District of California, Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed February 26, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12866

UNITED STATES OF AMERICA,

Plaintiff and Respondent,

vs.

ALLEN SMILEY,

Defendant and Appellant.

In the Matter of
The Application of ALLEN SMILEY, for a Writ
Of Habeas Corpus.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL, AND DESIGNATION OF PARTS
OF RECORD NECESSARY FOR CONSID-
ERATION THEREON

Points on Which Appellant Intends to Rely on
Appeal:

I.

The trial court erred in dismissing defendant's
Motion Pursuant to Section 2255, Title 28, United
States Code.

II.

The trial court erred in its Findings of Fact and
Conclusions of Law on said Motion Pursuant to
said Section 2255.

III.

That the trial court erred in granting respondent's Motion to Dismiss Petitioner's Application for a Writ of Habeas Corpus.

Designation of Record

Print the entire supplemental record referred to in sub-paragraph (b) of the Stipulation respecting the contents of the record on appeal with the exception of the Court Reporter's Transcript and as to the Court Reporter's Transcript print the following: Line 19, p. 16 to line 2, p. 19; Line 14, p. 21 to line 13, p. 23; Line 18, p. 30 to line 7, p. 31; Line 13, p. 31 to line 22, p. 35.

Also, print all of the matter referred to in sub-paragraphs (c) to (f) inclusive.

OTTO CHRISTENSEN and
JERRY GIESLER,
By /s/ OTTO CHRISTENSEN,
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed March 2, 1951.

No. 12866.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA and JAMES J. BOYLE,
United States Marshal for the Southern District of
California,

Appellees.

BRIEF OF APPELLANT.

OTTO CHRISTENSEN,
1212 Spring Arcade Building,
Los Angeles 13, California,

JERRY GIESLER,
9200 Wilshire Boulevard,
Beverly Hills, California,
Attorneys for Appellant.

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No. 12866.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA and JAMES J. BOYLE,
United States Marshal for the Southern District of
California,

Appellees.

BRIEF OF APPELLANT.

STATEMENT OF JURISDICTION.

This is an appeal from an order by the District Court of the United States for the Southern District of California, Central Division, denying appellant's Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code [R. 26] and from an order dismissing appellant's Petition for a Writ of Habeas Corpus [R. 33-34]. The questions presented in both appeals are identical, and the case is here on appeal on a common record pursuant to stipulation that the two causes be consolidated on appeal [R. 36]. The Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code, appears at page 6 of the Record, and the Petition for Writ of Habeas Corpus appears at page 29 thereof.

The mandate of this Court was filed on January 19, 1951, affirming the conviction of the appellant on Count 3 of Indictment 20069 Cr. [R. 3] and the appellant was

committed to custody and his bond on appeal exonerated [R. 5].

Thereupon, appellant filed his Motion to Vacate and for Relief Pursuant to Section 2255 [R. 5]. The Court found that it was true that the defendant was now in the custody of the Attorney General of the United States, through his representative, the United States Marshal, in and for the Southern District of California. That it was true that he was being restrained of his liberty by virtue of said custody pursuant to a certain judgment entered by the United States District Court [R. 18].

The District Court allegedly had jurisdiction under 28 U. S. C., Section 2255, and 28 U. S. C., Section 2241, and this Court has jurisdiction under 28 U. S. C., Section 2255, and 28 U. S. C., Section 2253.

Thereafter, the appellant duly filed his separate Notices of Appeal from said orders within the time prescribed by law [R. 27, 35], and contemporaneously therewith appellant filed his Designation of Grounds on Appeal [R. 28, 36].

Thereafter, appellant filed within the time prescribed by law his Designation of Record on Appeal [R. 36, 37, 51] and his Statement of Points on which Appellant Would Rely on Appeal, together with the Designation of the Parts of the Record necessary for consideration of his appeal [R. 51].

Thereafter, the Record in this case, including the transcript of all of the testimony and all of the evidence, together with all of the exhibits, separately and directly certified, was filed with the Clerk of this Honorable Court, together with a Statement of Points to Be Relied Upon on Appeal [R. 50, 51].

STATEMENT OF THE CASE.

The Motion to Vacate and for Relief Pursuant to Section 2255.

The Motion is predicated on the ground that the sentence was imposed in violation of the Constitution and the laws of the United States; and that the Court was without jurisdiction to impose such sentence. The Petition appears at pages 6 and 17. It was stipulated that the appellant had been committed to custody [R. 38]. The Motion was supported by the files and records in the case and by reference was made a part thereof [R. 9-10]; also the affidavit of J. E. Siu [R. 9, 16] and the Opinion of this Court on the Supplemental Petition for Rehearing [R. 11] were offered in evidence upon the proceedings had on said Motion [R. 38, 5].

The Findings of Fact and Conclusions of Law.

The trial court found that defendant was personally present during the entire proceedings and represented by counsel; that on the hearing of the defendant's Motion the Court received documentary evidence consisting of a copy of the affidavit of J. E. Siu [R. 16], a copy of the Opinion of this Court on the Supplemental Petition for Rehearing, defendant's verified Motion and the files and records of the case; that the sentence imposed upon the defendant herein was not in violation of the Constitution and not in violation of the laws of the United States, and the Court had jurisdiction to impose said

sentence; that it was true that the defendant was now in the custody of the Attorney General of the United States and was being restrained of his liberty by virtue of said custody pursuant to the judgment entered by the United States District Court for the term of one year, which is the judgment complained of in the Motion respecting which the Findings are made; that it is true that the defendant was convicted on Counts 1 and 3 of Indictment designated as No. 20069 and Indictment No. 20604, each count charging the defendant with violation of Section 746(a)(18), Title 8, of the United States Code; that it is true that the defendant was sentenced by the trial court to one year on each of said counts, that said sentences were to run concurrently, and that he was sentenced to pay a fine of \$1,000.00 on each of said counts; that it is true that the case was appealed to the United States Court of Appeals for the Ninth Circuit, and that said Court reversed the sentence on Count 1 of Indictment No. 20069 and on Indictment No. 20604; that it is true that the United States Court of Appeals affirmed the judgment of conviction on Count 3 of Indictment No. 20069; that it is true that the defendant petitioned the United States Supreme Court for a Writ of Certiorari as to the affirmed count, and that the same was denied; that it is true that thereafter defendant filed a Supplemental Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit, and that thereafter the said Court of Appeals transmitted its mandate to the trial court, and that said mandate has been received and spread upon the

minutes of the records of the trial court, and that a certified printed copy of the Opinion of the Court of Appeals on said Supplemental Petition for Rehearing is attached to the Motion [R. 11, 17, 20].

That it is not true that the defendant stands convicted of an offense not charged; that there was no material variance between pleading and proof; that defendant had a fair trial wherein there was no denial or infringement of his constitutional rights and no violation or infringement of any of his legal rights; that the evidence adduced at the trial supports the judgment [R. 24].

The Court found, as a conclusion of law, that the Motion to Vacate is without merit, that the defendant is properly imprisoned, that he is not entitled to be released upon any of the grounds in his Motion, and that there are no conditions existing to entitle him to relief pursuant to Section 2255, and that his Motion should be denied [R. 25].

Petition for Writ of Habeas Corpus.

Upon the entry of the order denying the Motion to Vacate Pursuant to Section 2255, the appellant filed his Petition for Writ of Habeas Corpus which made the same allegations as set forth in his Motion to Vacate [R. 26, 29]. The Petition for Writ of Habeas Corpus made reference to the Motion and by reference adopted the record of that case and the matters referred to in the Motion [R. 43].

Specifications of Error Upon Which Appellant Will Rely.

The trial court erred in its findings of fact and conclusions of law in that the sentence imposed was in violation of the Constitution of the United States for the following reasons:

- (a) Proof of a distinct false representation of citizenship from the one charged, as here, is insufficient to support a conviction, in that it is in violation of the Sixth Amendment which states: "In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; and (b) is a denial of due process as guaranteed by the Fifth Amendment of the Constitution."

2. The trial court erred in dismissing defendant's Motion Pursuant to Section 2255.

3. The trial court erred in its Findings of Fact and Conclusions of Law on said Motion Pursuant to Section 2255.

4. The trial court erred in granting respondent's Motion to Dismiss Petitioner's Application for Writ of Habeas Corpus.

ARGUMENT.

The Court Was Without Jurisdiction to Impose Sentence for the Following Reasons: (a) That Proof of a Distinct and False Representation of Citizenship From the One Charged, as Here, Is in Violation of the Sixth Amendment; and (b) Is a Denial of Due Process Guaranteed by the Fifth Amendment.

This case has been before this Honorable Court on appeal, and on two Petitions for Rehearing, and therefore much that would necessarily be said to acquaint the Court with the record becomes unnecessary. We are here again because we feel keenly that the Court has made a mistake on a matter which affects fundamental constitution rights. The protracted litigation probably is counsel's fault because of not writing with due clarity. We are therefore here again engaging in an attempt to persuade the Court to re-examine the issues as we perceive them to exist.

On the Supplemental Petition for Rehearing, this Court did the unusual thing of entertaining the same and writing an Opinion because it felt the "contention that the crime charged in the indictment was separate and distinct from that upon which appellant was tried and convicted, and that appellant was not aware of the variance until a very late date" merited a consideration of the Petition. The Court in this Opinion is in agreement with our contention of the facts in the case when it states:

"The third count charged the misrepresentation of citizenship to have been made to one Siu, a deputy sheriff of Los Angeles, California. The evidence

disclosed that the false statements with which appellant was charged were made in the course of a booking operation at the Sheriff's office, after an arrest. The answers were recorded on a form sheet provided for that purpose. It appears that the lower portion of the form which contains the false statement was filled in by Deputy Sheriff Hopkins, not Siu and that Siu did not hear the false answers."*

Then this Court said immediately following the above statement:

"Hence, it is argued that a fatal variance exists between the allegation and proof."

This, we respectfully suggest, is an over-simplification of our position. However, this Court did predicate its Opinion solely upon the premise of whether a fatal variance existed between the allegation and proof, saying:

"The true inquiry is not whether there has been a variance but was it such as to affect the substantial rights of the accused. *Berger v. United States*, 295 U. S. 78, 82; *United States v. Regan*, 314 U. S. 513, 526. 'No variance ought ever to be regarded as material where the allegation and proof substantially correspond, or where the variance was not of a character which could have misled the defendant at the trial.' *Washington & Georgetown R. Co. v.*

*For convenience we have set forth in an Appendix the Record facts.

Hickey, 166 U. S. 521, 531. In a criminal case there must 'be added the further requisite that the variance be not such as to deprive the accused of his right to be protected against another prosecution for the same offense.' *Berger v. United States*, *supra*, p. 83."

The Court further added:

"In the instant case we have a variance in names. . . . It is evident that the same defense would have been made had Hopkins been named in the indictment."

We respectfully urge that the Court re-examine the *Berger* case because we feel that the basic question is totally different than the one presented here. In the *Berger* case, it will be remembered that under the indictment the same conspiracy could have been proven against either group. The shoe actually fitted the foot. Either group of defendants could have been tried under that indictment precisely as the charge was laid. There, each group of defendants was actually convicted of the identical and precise charge made in the indictment. As the Court said in the *Berger* case, *supra*, at page 81:

"In the present case, the objection is not that the allegations of the indictment do not describe the conspiracy of which petitioner was convicted, but, in effect, it is that the proof includes more."

Our complaint here is not that the "proof includes more," but that it is proof of a distinct charge not made, and that proof of the cardinal allegation in the indictment of a false representation of citizenship to Siu was not made at all.

The Court in the *Berger* case, continuing, says:

“If the proof had been confined to that conspiracy, the variance, as we have seen, would not have been fatal. Does it become so because, in addition to proof of the conspiracy with which petitioner was connected, proof of a conspiracy with which he was not connected was also furnished and made the basis of a verdict against others. . . . The proof here in respect of the conspiracy with which Berger was not connected, may, as to him, be regarded as incompetent . . . and . . . the fact that the proof disclosed two conspiracies instead of one, *each within the words of the indictment*, cannot prejudice his defense of former acquittal of the one or former conviction of the other.”

Could the Government have supported this Count 3 by Hopkins’ testimony alone? It would be proof of the *cardinal element* of a false representation to a person other than the indictment charges. Could the trial court have amended the indictment and substituted Hopkins’ name for that of Siu? The trial court, of course, could not amend the indictment. There can be only a fictional difference between calling it a variance of names and an indictment amended. Submitting the case to a jury under these circumstances would be as effective as doing the unconstitutional thing of amending the Indictment because the results would be identical. In fact, counsel couldn’t even have consented to the substitution of Hopkins’ name for that of Siu.

Let’s take the converse of the above inquiry, *i. e.*, that Hopkins had not testified, and that the conviction on the third count rested solely on the testimony of Siu, and that this Court had held that the Government’s theory of birth

and life in the United States was sufficient to support a charge of false representation; could the appellant plead the conviction in a subsequent prosecution for having made a direct false representation that he was a United States citizen to Hopkins and out of the presence of Siu?

We earnestly feel that the answer would have to be "no." We feel that the basic question here is not a mere case of variance of names, but is a case of variance of offenses charged. It is not a case of charging an incorrect name, *i. e.*, Siu being known by another name. Our case is not one of names but of two distinct persons.

Further, we respectfully refer again to the *Berger* case, where it was held that under that indictment the plus evidence in the case would be regarded as incompetent. Hopkins' testimony, in the light of the observations in the *Berger* case, being considered incompetent, there is no proof remaining of any offense.

If appellant's counsel could not consent to the substitution of the name of Hopkins for Siu's in the indictment, then it cannot be done by judicial action. Neither could he be tried for having made the false representation to Hopkins rather than to Siu under the indictment alleging that it was made to Siu. We again refer this Honorable Court to and request a re-examination of your own decision in *United States v. Edgerton*, 143 F. 2d 697, in which it was held that deleting a portion of the indictment by instruction with reference to one of the alleged false representations was fatal, and resulted in the trial of the defendants on a charge different from that found by the grand jury. In that case, the assignments of error was that the trial court erred in overruling the motion for an order arresting judgment on the grounds that: (a)

The purported verdict returned by the jury is not a verdict based upon the indictment returned by the grand jury; (b) The Court had no jurisdiction to impose judgment and sentence upon an indictment amended by him; (c) The Court altered and amended the indictment by striking therefrom the language contained therein, "Theretofores approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations."

Ever since the decision in *Ex parte Bain*, 121 U. S. 1, the rule has been firmly settled in the Federal courts that no power exists in the trial court to alter, amend, delete, or add to an indictment presented by a grand jury, and that a conviction upon such an amended or altered indictment is void.

This Court, in the case of *Stewart v. U. S.* (C. C. A. 9), 12 Fed. 524, 525, had occasion to consider this precise question, and held that where an indictment for the crime of smuggling charged that defendants did knowingly, willfully, unlawfully, and feloniously, etc., and with intent to defraud, etc., bring into the United States certain intoxicating liquors, it was fatal error for the trial court to strike out as surplusage the word "*feloniously*." This Court said:

"At the commencement of the trial, by consent of counsel for all parties, the court struck from the body of counts 2 and 3 of the indictment, as surplusage, the words 'feloniously and' in one place, and the words 'and feloniously' in another. This action on the part of the court is now assigned as error. The assignment is well taken. In *Ex parte Bain*, 121 U. S. 1, 13, 7 S. Ct. 781, 787 (30 L. Ed. 849), the trial

court struck six words from the indictment, as surplusage, and in discharging the petitioner on habeas corpus the Supreme Court said:

“‘It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. *We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury.* The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. . . . the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. . . . The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence.’

“In the course of the opinion there is some discussion of the question as to whether the grand jury

would have returned the indictment with the stricken words omitted, but an examination of the entire opinion shows very clearly that the decision was based upon the broad ground that under English and American law no authority exists in a court to amend any part of the body of an indictment, without re-assembling the grand jury, unless by virtue of statute.

“In *Dodge v. United States*, 258 F. 300, 169 C. C. A. 316, 7 A. L. R. 1510, certain words were likewise stricken from the indictment as surplusage, and, in holding that such action on the part of the court avoided the indictment, the Circuit Court of Appeals for the Second Circuit said:

“‘At the close of the case counsel for the government moved to strike out as surplusage a portion of the first paragraph of the first count of the indictment and the word “mutiny” from the first paragraph of the second count. Counsel for defendant at once said: “No objection.” The court granted the motion. This is now assigned for error. That it was error of the most serious kind is not to be doubted. The rule is almost universally recognized, both in this country and in England, that an indictment cannot be amended by the court, and that an attempt to do so is fatal to a verdict upon the count.’ . . .

“So here the amendment of the indictment avoided the second and third counts, but did not affect the convictions under the remaining counts unless some other error intervened.”

In the case of *Ex parte Bain*, *supra*, 121 U. S. 1, 5, 9, the indictment charged a violation of the statute making it a crime to give any false report or statement of the banking association with intent to injure the association or any other company or individual or to deceive any officer of the association or any agent appointed to examine the affairs of such association. The indictment charged an intent to deceive the *comptroller of the currency* and the agent appointed to examine the affairs of said association and to injure, etc., the United States, etc. Upon demurrer, the trial court had ordered the italicized words deleted. *The conviction was set aside on habeas corpus*, the Supreme Court holding that the indictment on which defendant was tried was not the indictment of the grand jury. There was nothing before the Court on which it could hear evidence or pronounce sentence.

The rule of the case of Ex parte Bain has never been departed from and was reaffirmed by the Supreme Court in the case of *U. S. v. Norris*, 281 U. S. 619-622, 74 L. Ed. 1076, 1077, where the Court held that a stipulation of facts was ineffective to import an issue as to the sufficiency of the indictment or an issue as of fact upon the question of guilt or innocence after plea of *nolo contendere*, the Court saying:

“If the stipulation be regarded as adding particulars to the indictment, it must fall before the rule that nothing can be added to an indictment without the concurrence of the grand jury by which the bill was found. *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 16 Am. Crim. Rep. 122. If filed before plea and given effect, such a stipulation would oust the jurisdiction of the court.”

It has been held that the district attorney, where an indictment is attacked as duplicitous, may not elect to rely upon one of the offenses charged and *nolle pros.* the others, as this would in effect constitute an amendment of the indictment. *U. S. v. Dembowski*, D. C. Mich., 252 Fed. 894-898:

“It seems clear that, if the District Attorney is permitted to *nolle pros.* a portion of this indictment, he will thus, in effect, be permitted to amend it, because, in that event, the indictment on which the defendant is tried will not be the same as that found by the jury. . . . To amend is to ‘free from error’; to ‘remove what is erroneous, superfluous, faulty, and the like.’ 2 Corpus Juris, 1317. In Words and Phrases, vol. 1, First Series, at p. 368 *et seq.*, and in vol. 1, Second Series, at p. 199 *et seq.*, numerous authorities are cited and quoted showing that an amendment may consist of either the addition to, or the withdrawal from, a pleading or document of a part thereof.”

In *Naftzger v. U. S.* (C. C. A. 8), 200 Fed. 494, 496-497, it was held that although it was unnecessary that the indictment for receiving stolen stamps should have specified that they were stolen from “certain post offices in the State of Kansas,” *nevertheless the indictment having so specified, the descriptive words could not be stricken as surplusage.* The Court said:

“Counsel for the government contend that the recital of the indictment that the stamps were stolen from ‘certain post offices in the state of Kansas’ is surplusage, and need not be proven, and that it sufficed if made to appear that they were stolen elsewhere from the government. We are of the opinion

that, if the allegation had omitted the words quoted, it would have been sufficient; *but, having been alleged, the evidence must conform to and support the allegation.* The return of an indictment is the work of the grand jury only—a co-ordinate branch of the court.” (Emphasis ours.)

After referring to *Ex parte Bain* the Court said:

“It was conceded that there was no necessity to allege that the Comptroller was deceived, as we concede that it would be a crime to knowingly receive stolen stamps from wheresoever stolen from the Government. But it is alleged that the stamps were stolen within the state of Kansas.

“An indictment is for the purpose of conferring jurisdiction and advising the court of the charge, and to advise the defendant of what he must meet; and if, after thus advising the defendant that the stamps were stolen in Kansas, the government can be allowed to show that they were stolen in some other state, such an allegation is misleading, and can be used as a snare to deceive a prisoner.”

In all the foregoing cases the matters deleted were not in themselves substantial or material, except that the grand jury, in framing the indictment in those particular terms, had constituted such terms material. In our case it is Siu, not Hopkins, who is the person the indictment charges the false representation was made.

The United States Supreme Court in reversing *Thornhill v. State of Alabama*, 310 U. S. 87, 96, 84 L. Ed. 1093, 1099, said:

“Conviction upon a charge not made would be a sheer denial of due process.”

To the same effect, see *De Jonge v. Oregon*, 299 U. S. 353, 81 L. Ed. 278, 57 S. Ct. 355; *Stromberg v. California*, 283 U. S. 359, 368, 75 L. Ed. 1117, 1122, 1123.

See:

Oddo v. U. S., 171 F. 2d 854, 857 (C. C. A. 2).

We feel that we were not called upon to defend as to Hopkins. We were not confronted with—nor did we know about—Hopkins until the trial. We feel that this Court has overlooked some phases of the record when it says that “trial counsel for appellant relied on the theory that no crime had been committed because the person to whom the false representations were made had no right to ask the questions.” We did not rely upon any such theory ourselves, but were driven in the course of the trial to that position because the trial court and the Government tried the case upon the theory that birth and life in the United States alone supported the charge. In consequence the testimony of Hopkins on the distinct and direct representation at a different time and place was immaterial. The most that can be said of it is that it was incompetent as showing a separate offense.

We earnestly request the Court to refer to the Record because it is mistaken in this regard, as we challenged at the appropriate occasion, on a motion for a directed verdict of acquittal, the proposition of the Government that evidence of birth in the United States and having lived in the United States established a violation of the

statute. In that argument, challenging the sufficiency of the evidence, we find the record discloses the following:

“Mr. Christensen: . . . The mere negative statement of birth does not in itself establish that. The burden would be on the government to show that there was an affirmative representation and claimed citizenship.

“We know that at one time Indians, although native-born, were not citizens.

“We also know that children of the Diplomatic Corps were not citizens. We also know that there is such a thing as repatriation in spite of the fact that one may be or had been a native-born citizen.” [R. 163.]

“The Court: . . . Do you think the allegation as to citizenship is proved by proof that the defendant made a statement that he was born in the United States.” [R. 196.]

“Mr. Tolin: . . . I take it that is what your Honor has in mind and the statement as to Mr. Siu . . . maybe as to that Siu count there might be a question . . . After he had stated to Mr. Siu that he had been in the United States all of his life, which would mean that he had been a citizen unless he was a child of some diplomat, and I think Mr. Christensen suggested that that was a legal possibility in these cases, that would put him in the class of those defendants who having peculiar knowledge of an exception have to prove the exception rather than the government negating the exception . . . unless he is the child of some diplomat who was here in the diplomatic service, he could

not have been born in the State of New York and be in this country all his life without being a United States citizen.” [R. 199.]

The foregoing establishes beyond cavil that the question was squarely before the trial court, and also that the trial court by its own question was cognizant of it.

The trial court overruled our Motion challenging the sufficiency of the evidence and compelled us in defense to move to the theory that the persons to whom it was alleged the false representations were made were not persons having a legal right to ask the questions in furtherance of legal authority. The Hopkins testimony was unimportant in view of the theory adopted by the trial court, but when the case was reversed by this Court on the ground that birth and life in the United States was insufficient, it then assumed a position of grave importance in the light of this Court’s holding that Hopkins’ testimony gave the supporting proof to Count 3.

The Petition for Writ of Habeas Corpus presents precisely the same questions as presented under the Motion Pursuant to Section 2255. The Petition for Habeas Corpus was filed after the taking of the proper steps under the Section 2255 because we felt that there was some grave doubt as to the constitutionality of that section. We submit the Petition for Writ of Habeas Corpus upon the argument made with respect to the Motion under said section.

Conclusion.

We feel, in the interest of justice, that the Order of the Court denying relief under Section 2255 should be reversed with directions to grant the appropriate relief under that section, or in the alternative the order of the trial court denying the Petition for Writ of Habeas Corpus should be reversed with directions to issue the writ and discharge the appellant.

Respectfully submitted,

OTTO CHRISTENSEN and

JERRY GIESLER,

Attorneys for Appellant.



APPENDIX.

There was no evidence whatsoever that appellant made any representation of United States citizenship to Siu, or that Siu was present when any representation of United States citizenship was made.

Siu testified that he, together with other officers, arrested petitioner and took him to their office located at 414½ North Hill Street, Los Angeles; that at that place he booked him on a charge of violating 836-3 of 337-A; that he made out an arrest slip which contained his name, address, date of arrest, complexion, weight and height, and years lived in County, in the State and in the United States. To the question, "How long in the United States?" the petitioner answered "Life." [R. 81-82.]* This was the content of "Exhibit 4" and were the questions asked and answers given by the petitioner at 414½ North Hill Street, Los Angeles. On the top portion of "Exhibit 5" which bears Siu's signature is the same information that is on the arrest slip. Siu testified that this information was taken off of the arrest slip by a clerk at the County Jail later from the arrest slip. [R. 84.] When asked if he had any other conversation with the Petitioner in the course of either the arrest or the transfer to jail, or his interviews with him in connection with the alleged offense concerning petitioner's citizenship, he answered, "No other conversation other than what I asked him when I made out the arrest slip." [R. 85.]

*The Record pages referred to in the Appendix are to the original printed Record on Appeal in Case No. 12375, which Record was offered and received in evidence upon the hearing of the motion and petition and is separately certified.

The witness, Hopkins, testified in response to the questions of the United States Attorney on direct examination that he first filled out the upper part of "Exhibit 5" above the signature of Mr. Siu and that then Mr. Siu went away. [R. 121-122.] That after the departure of Mr. Siu from the County Jail he then filled out the remainder of "Exhibit 5" which contained the question, "United States Citizenship?" and the answer "Yes." [R. 123.]

That Siu was not present at the time the representation was made we say is clear from the record; in addition thereto, we have filed an Affidavit of said government witness, Jacob E. Siu, concurrently herewith which reads as follows:

"That at no time did I ask the question appearing in Exhibit 5, 'United States Citizen?' of Mr. Smiley, neither at the time of my interviewing him at 414½ North Hill Street, on or about the 25th day of May, 1944, or later that day at the County Jail booking office in the presence of Milton S. Hopkins, Deputy Sheriff, or at any other time hear such a question put to Mr. Smiley; Neither on said day, or at any other time, did Mr. Smiley say to me that he was a citizen of the United States, nor did I hear him say so to any other person.

s/ JACOB E. SIU.

Subscribed and sworn to before me this 19th day of October, 1950.

s/ MINNIE F. CHETWOOD,
Notary Public in and for the County of Los Angeles,
State of California."

Unequivocally, the record is that the Petitioner stands convicted of a distinct and separate offense not charged. He stands convicted of having represented to another person (Hopkins), at another time and place, that he was a United States citizen, whereas the indictment charged that he made the false representation of United States citizenship to Siu; and the proof is that it was at another time and place than the incident with Hopkins that Siu interviewed him, at which interview nothing whatever was said about United States citizenship.

No. 12866.

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Appellees.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

Statement of Jurisdiction.

This is an appeal from an Order of the District Court of the United States for the Southern District of California dismissing Appellant's Petition for a Writ of Habeas Corpus [Record 33, 34]. It is consolidated with an appeal from an Order of the same Court denying Appellant's Motion to Vacate and for Relief pursuant to Section 2255, Title 28, United States Code. The Petition for Writ of Habeas Corpus appears at page 29 of the Record. The Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code, appears at page 6 of the Record. Prior to filing of the Petition for Writ of Habeas Corpus the Appellant had surrendered for execution of the Judgment of Conviction imposed on him on Count 3 of Indictment No. 20069 in the District Court of the United States for the Southern District of

California, Central Division. His bail had been exonerated and service of the sentence commenced.

The questions presented in both appeals are predicated upon the same Record and concern the same facts. The District Court which heard the Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code, was the same District Court which had imposed the sentence under said Indictment. The Motion was heard before the same Judge of said Court. Whereas this Court has held that said Section 2255, Title 28, United States Code, is unconstitutional¹ it cannot properly be said that the District Court had jurisdiction to hear that Petition but the statutes which purportedly conferred jurisdiction upon the District Court to hear said Petition are Title 28, United States Code, Section 2255, and Title 28, United States Code, Section 2241. This Court has jurisdiction to determine the appeal from the Order denying said Motion and to determine the appeal from the Petition for a Writ of Habeas Corpus by virtue of Title 28, United States Code, Section 2253.

Statement of the Case.

On August 1, 1949, Appellant was sentenced to imprisonment for a term of one year upon each of three counts which severally charge him with the offense of false claim of citizenship in violation of Section 746 (a)(18), Title 8, United States Code. Two of said judgments of conviction related to Case No. 20069 Criminal in the District Court of the United States for the Southern District of California, Central Division, and one of said judgments

¹*Hayman v. United States*, 187 F. 2d 456.

of conviction related to Case No. 20604 Criminal in the District Court of the United States for the Southern District of California, Central Division. An appeal was taken as to all of said convictions and was heard in this Court as Case No. 12375. The Opinion of this Court reversing the judgment in Case No. 20604 Criminal and reversing the judgment as to Count 1 in Case No. 20069 Criminal and affirming the judgment as to Count 3 in Case No. 20069 Criminal is reported at 181 F. 2d 505. The Opinion of this Court denying a Supplemental Petition for Rehearing and Motion to Remand as to that part of the case which resulted in an affirmance of the judgment of conviction as to said Count 3 is reported at 186 F. 2d 903. Prior to his supplemental petition for rehearing Appellant petitioned the Supreme Court of the United States for a Writ of Certiorari. This was denied. Reduced to its simplest terms, the point made by Appellant in his Motion to Vacate and for Relief Pursuant to Section 2255, and again made in his Petition for Writ of Habeas Corpus, is that he was charged in the Indictment with one offense and was convicted of another. The point thus urged at the hearing of said Motion and said Petition for Writ of Habeas Corpus is the identical point presented to this Court on the Supplemental Petition for Rehearing and Motion to Remand, and disposed of by the judgment of this Court January 19, 1951, in its Opinion reported at 186 F. 2d 903.

Argument.

Appellant misconceives the function of a writ of habeas corpus. It is not in the nature of an appeal by which claimed errors in a criminal trial are examined. Such claims of error are properly reviewable only in an appeal from the judgment in a criminal case. Appellant herein sought such a review following his conviction in the District Court. That review was accorded him by this Court. After affirmance of the judgment now being executed, the Appellant petitioned the Supreme Court for certiorari and there presented exactly the argument now being repeated in this appeal. After the Supreme Court denied certiorari, this Court engaged in the extraordinary procedure of entertaining what was designated "Supplemental Petition for Rehearing and Motion to Remand." This was in effect a second petition for rehearing in this Court. At that time Appellant urged that he had been charged with making a false claim of citizenship to J. E. Siu whereas the proof was that he had made that false claim of citizenship to one Hopkins instead. It was argued to this Court that the language of the Indictment was that the false claim had been made to "J. E. Siu, a deputy Sheriff of the County of Los Angeles" and that the material description was the language "a deputy sheriff". The identification of the particular deputy as being named Siu, it was contended was merely continuing descriptive matter not vital to the charge. This Court, after considering the Supplemental Petition, adopted the view that the most that had occurred was a variance and that the variance was not material. In its Opinion in that regard, this Court said:

Rule 52(a) of the Rules of Criminal Procedure provides: "Any error, defect, irregularity or *variance* which

does not affect substantial rights shall be disregarded.” (Emphasis added.) This provision is said to restate the prior law. In the instant case we have a variance in names. Not every such variance is fatal.

Ex Parte Hull, 312 U. S. 546;

Bennett v. United States, 227 U. S. 333;

Ferrari v. United States, 9 Cir., 169 F. 2d 353.

Measuring the situation in the instant case by the yardstick announced in the cited cases, we find no fatal variance. The entire proceeding relating to giving of the false answer to the deputy sheriff, was carried on in a room in which Deputy Sheriff Siu was present most, if not all, of the time. The document upon which the alleged false answer of appellant was recorded was in evidence at the trial. It would be idle to say that the able counsel representing appellant was not advised of the entire circumstances of the making of the answer if not of the particular party to whom made. He was not concerned so much with that phase of the case because of his conception of the law. It is evident that the same defense would have been made had Hopkins been named in the indictment. As an evidence of how little concern counsel for appellant placed on the particular individual in the Sheriff's office to whom the alleged statements were made, we cite his statements to the trial court in argument for a new trial. In explanation as to why the appellant was not called as a witness, counsel stated:

“The facts are so simple in the case. In fact, we did not dispute them, stipulating that he was an alien, and, secondly, virtually admitting that on the occasions of his interviews by booking officers . . . that he was asked certain questions with reference

to his birth, . . . it was for that reason, Your Honor, that I did not place the defendant on the stand, because, if he had been, he would testify precisely that way under oath, . . . I may have made a mistake because the jury didn't hear the sound of the voice of the defendant, but I could see no purpose because there was nothing to deny as far as the actual facts of the case were concerned.

"This statement of counsel, made after the trial, can be relevant only to point up the theory on which the case was tried and leaves no reason for a finding of surprise and that a different defense would or could have been urged in the event Hopkins had been named in the indictment. The evidence at the trial was in part documentary. It is of such a character as to firmly peg the crime charged to the circumstances of time and place and persons present in such a manner as to fully protect appellant against another prosecution for the same offense. He would have no difficulty were another prosecution attempted in showing former jeopardy."

Appellant had argued at the hearing which preceded the Opinion just quoted, that he was the victim of an attempted amendment to the Indictment. Having failed in that argument in this Court, he simply reiterated it in the District Court by the vehicle of a Petition for Writ of Habeas Corpus and a Motion grounded upon the unconstitutional Section 2255, Title 28, United States Code. The District Court perceiving that it was merely asked to re-examine what had already been examined by this Court, refused relief to petitioner who now reargues here what has already been reviewed here.

The Writ of Habeas Corpus is not available to secure a new review of matters passed upon in the trial of the case and reviewed in the Appellate Court.

Berkoff v. Humphrey, 159 F. 2d 5, at p. 7 (C. C. A. 8) 1947:

“* * * The hearing on habeas corpus is not in the nature of an appeal nor is it a substitute for the functions of the trial court. This is true as to controverted issues of fact and as to disputed issues of law ‘whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court.’ *Henry v. Henkel*, 235 U. S. 219, 229, 35 S. Ct. 54, 57, 59 L. Ed. 203. ‘It is fundamental that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved. Otherwise every judgment of conviction would be subject to collateral attack and review on habeas corpus on the ground that no offense was charged or proved.’ *Knewel v. Egan*, 268 U. S. 442, 446, 45 S. Ct. 522, 524, 69 L. Ed. 1036.”

A writ of habeas corpus is not available to a defendant who, having questions which could not be raised in the trial court, failed to raise them.

Dorsey v. Gill, 148 F. 2d 857, at p. 872; Court of Appeals, District of Columbia, 1945:

“It has been suggested that the Supreme Court in the *Bowen* case, and in other recent cases, intended to say that the writ of habeas corpus is available,

not only when jurisdiction is lost during the course of the proceeding by deprivation of a constitutional right, but also whenever a petitioner is able to allege that he failed to enjoy a constitutional right. We see no reason to impute such an intention to the Supreme Court. A careful reading of its opinions will show that it is not the purpose of the writ to *compel* or *require* enjoyment of constitutional rights in all cases where, for example, they have been waived, intelligently by the petitioner himself, or for him by counsel. The applicable rule has been well stated by Judge Parker: 'Ordinarily, failure to raise a constitutional question during trial amounts to waiver thereof (United States [ex rel. Jackson] v. Brady, 4 Cir., 133 F. 2d 476, 481), and only where failure to raise the question at the trial was due to ignorance, duress or other reason for which petitioner should not be held responsible, may resort be had to habeas corpus in the federal courts, and, even in these cases, only where it is made to appear that there has been such gross violation of constitutional right as to deny to the prisoner the substance of a fair trial and thus oust the court of jurisdiction to impose sentence.'

"Our conclusion is fortified, also, by the Supreme Court's contemporaneous restatement of the rule previously declared that the writ of habeas corpus cannot be used for the purpose of an appeal, or to retry the issues, whether of law or of fact. Bearing in mind that the use of the writ, in a case involving deprivation of constitutional rights, is limited to the exceptional situation in which it is the only means of preserving such rights, it is obvious that no useful or necessary purpose would be served by trying—over and over again—in habeas corpus proceedings, the same questions which were fully considered and fairly determined in the original proceeding."

Whatever the boundaries are of the power of the District Court under a writ of habeas corpus, it cannot be said that there lies within such boundaries the power of such District Court to act as a reviewing court on a habeas corpus proceeding to both the United States Court of Appeals and the Supreme Court on matters and things previously considered and decided by such Appellate Courts on appeal in the specific case sought to be re-litigated again before the District Court. It is true that the Supreme Court has acted only to the extent of a denial of a petition for a writ of certiorari but it did act to that extent and this Court, in the previously quoted Opinion, acted decisively after briefs and argument upon the specific issue now urged again upon this Court of Appeals. There must be an end to litigation and that end is not appropriately deferred beyond the second Opinion of the Court of Appeals and the declination of the Supreme Court to take the case.

The Petition to Vacate and for Relief under Section 2255 of Title 28, United States Code, was additionally inappropriate by reason of the unconstitutionality of that statute as proclaimed in *Hayman v. United States*, 187 F. 2d 456.

Conclusion.

It is respectfully submitted that the Orders appealed from should be affirmed.

Respectfully submitted,

ERNEST A. TOLIN,

United States Attorney,

Attorney for Appellees.



No. 12868

United States
Court of Appeals
For the Ninth Circuit.

RAYMOND WRIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the District Court
for the Territory of Alaska,
Fourth Division.

FILED

MAY 23 1951

PAUL F. O'BRIEN,

CLERK



No. 12868

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

EVERETT W. HEPP,

Fairbanks, Alaska,

Attorney for Plaintiff & Appellee.

QUINCY W. BENTON,

JULIEN A. HURLEY,

Fairbanks, Alaska,

Attorneys for Defendant & Appellants.

In the District Court for the District of Alaska,
Fourth Judicial Division
No. 1507 Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAYMOND WRIGHT,

Defendant.

INDICTMENT

The Grand Jury charges:

On or about the 14th day of April, 1950, in the Fourth Judicial Division, Territory of Alaska, Raymond Wright feloniously induced and procured a woman, to wit, Vanada Donaby, for the purpose of prostitution, in violation of Section 65-9-21 of the Alaska Compiled Laws Annotated, 1949.

Dated at Fairbanks, Alaska, this 17th day of October, 1950.

A True Bill

/s/ RAY KOHLER,

Foreman of the Grand Jury.

/s/ EVERETT W. HEPP,

United States Attorney.

Witnesses before the Grand Jury.

VANADA DONABY,

NATHANIEL WOOD,

WILLIAM JONES.

[Endorsed]: Filed October 17, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the above-named defendant by *their* attorney, Quincy Benton, and respectfully move this Court for an order dismissing the Indictment herein for the reason that the same does not state facts sufficient to constitute a crime.

/s/ QUINCY BENTON,
Attorney for Defendants.

Service of copy acknowledged.

[Endorsed]: Filed October 25, 1950.

[Title of District Court and Cause.]

ORDER, PLEA & SETTING TIME FOR TRIAL

The Government was represented by Everett W. Hepp, U. S. Attorney; the defendants were present in person and represented by Quincy Benton.

Respective counsel had argument on the defendants' Motion to dismiss the Indictment. It was Ordered that the motion be denied.

This being the time set for the defendants to plead to the Indictment, upon being asked if they were Guilty or Not Guilty of the crime charged in the Indictment, to wit: Inducing & Procuring Female for Prostitution, both defendants pled Not

Guilty, which plea was Ordered accepted, and the trial of this cause was set to follow 1517 Cr.

Entered in Court Journal Oct. 25, 1950.

[Title of District Court and Cause.]

PLEA & SETTING TIME
FOR TRIAL

The Government was represented by Everett W. Hepp, U. S. Attorney, the defendants were present in person and represented by Quincy Benton.

The Plea of the defendants to the Indictment as entered on October 25, 1950, being in error, no plea having been made by the defendants, It was Ordered that the Plea be entered forthwith.

Upon being individually asked if they were Guilty or not Guilty of the crime charged in the Indictment, to wit: Inducing and Procuring Female for Prostitution, each defendant individually pled Not Guilty which Plea was accepted and Ordered entered and the trial of this cause was set for 10:00 a.m., Friday, November 3, 1950, and the defendants were discharged from custody.

Entered in Court Journal Nov. 2, 1950.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 1507 Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAYMOND WRIGHT,

Defendant.

VERDICT

We, the Jury, duly empaneled and sworn to try the above-entitled cause, do, from the law and the evidence therein, find that the defendant, Raymond Wright is guilty of the crime of feloniously procuring a woman for the purpose of prostitution as set forth in the indictment in this case. .

Dated at Fairbanks, Alaska, this 6th day of November, 1950.

/s/ ELMER R. O'NEAL,
Foreman.

Entered in Court Journal Nov. 6, 1950.

[Endorsed]: Filed November 6, 1950.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 1507 Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAYMOND WRIGHT,

Defendant.

JUDGMENT AND COMMITMENT

On the 22nd day of November, 1950, came the United States Attorney, and the defendant, Raymond Wright, appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted on a verdict of guilty of the crime of feloniously procuring a woman for the purpose of prostitution, committed in the Fourth Judicial Division, Territory of Alaska, on or about the 14th day of April, 1950, by the defendant feloniously procuring a woman, to wit, Vanada Donaby, for the purpose of prostitution; and the defendant having been asked whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court;

It Is Adjudged:

That the defendant is guilty of the crime of Procuring a Woman for the purpose of Prostitution, and that he shall be confined in the United States

Penitentiary at McNeil Island, Washington, for a period of three (3) years, such sentence to commence on the 22nd day of November, 1950.

It Is Ordered that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal, or other qualified officer, and that the same shall serve as the commitment herein, and that said defendant pay the costs of this action in the sum of \$36.00 to be taxed by the Clerk of the Court.

Done at Fairbanks, Alaska, this 22nd day of November, 1950.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal Nov. 22, 1950.

[Endorsed]: Filed November 22, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Raymond Wright, Fairbanks, Alaska.

Julien A. Hurley and Quincy Benton, Attorneys
for defendant.

Offense: Inducing and procuring a woman for the purpose of prostitution.

Whereas, Raymond Wright was duly tried and by a jury's verdict convicted of the crime of feloniously procuring a woman for the purpose of prostitution on the 22nd day of November, 1950; and was

sentenced by the court to be confined in the United States penitentiary at McNeil Island, Washington, for a period of three years.

The said Raymond Wright, defendant, is now confined in the Federal jail in the Federal Building at Fairbanks, Alaska.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the above-stated judgment.

Dated this 27th day of November, 1950.

/s/ RAYMOND WRIGHT,
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed November 27, 1950.

[Title of District Court and Cause.]

ORDER FOR RELEASE

Whereas, Raymond Wright, the above-named defendant, was duly tried and, by a jury, convicted of the crime of feloniously procuring a woman for the purpose of prostitution, and, on the 22nd day of November, 1950, sentenced to be confined in the United States penitentiary at McNeil Island, Washington, for a period of three years; and

Whereas, the said Raymond Wright has furnished bail in accordance with the law thereto pertaining.

Now, therefore, you, the United States Marshal for the Fourth Division of the Territory of Alaska,

are instructed to release the said above-named defendant pending further orders from the above-mentioned Court.

Done this 27th day of Nov., 1950.

/s/ HARRY E. PRATT,

Judge of the District Court.

Receipt of copy acknowledged.

Entered in Court Journal Nov. 27, 1950.

[Endorsed]: Filed November 27, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE,
RECORD AND DOCKET TRANSCRIPT

On motion of attorney for the above-named defendant, Raymond Wright, for an order extending the time for filing, recording and docketing the transcript of the above-entitled case on appeal, and it appearing to said Court that by reason of the necessity for the Court Reporter to order supplies for preparing said transcript; said Court Reporter's absence from the jurisdiction of the above-entitled Court; said Court Reporter's time since the filing of the Notice of Appeal having been taken up by his regular trial reporting duties; and the possibility that such condition will continue for some time, it is inadvisable to require the Clerk of this District Court to prepare and deliver said record on appeal within the time heretofore allowed, and

said Court being duly advised in the premises and good cause appearing therefor,

It Is Hereby Ordered That the time within which the record on appeal in this case shall be deposited and filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, and said case docketed therein, be and it is hereby enlarged to and including the 130th day following the date of filing the Notice of Appeal in said above-entitled case; namely: the 25th day of February, 1951.

Dated at Fairbanks, Alaska, this 5th day of January, 1951.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal Jan. 5, 1951.

[Endorsed]: Filed January 5, 1951.

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To: John B. Hall, Clerk of the above-entitled Court:

You will please prepare transcript of record in the above-entitled cause, to be filed in the office of the Clerk of the United States Court of Appeals for the Ninth Circuit sitting in San Francisco, California, upon the appeal heretofore perfected at said Court, and include therein the following papers and records, to wit:

1. Indictment.
2. Motion to Dismiss Indictment.
3. Order Overruling Motion to Dismiss Indictment.
4. Order, Plea and Setting Time for Trial.
5. Verdict.
6. Judgment and Commitment.
7. Exhibit Number 1.
8. Notice of Appeal.
9. Order for Release.
10. Order Extending Time to File Record and Docket Transcript.
11. Transcript of Testimony and Trial.
12. Praecipe for Transcript of Record.

The transcript is to be prepared as required by law and the rules and orders of this Court and the United States Court of Appeals for the Ninth Circuit and should be forwarded to said Court in San Francisco so that the same may be docketed therein on or before the 25th day of February, 1951.

Dated at Fairbanks, Alaska, this 23rd day of February, 1951.

/s/ QUINCY BENTON,

/s/ JULIEN A. HURLEY,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 23, 1951.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 1507 Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAYMOND WRIGHT and VERNESTINE
WRIGHT,

Defendants.

APPEARANCES

EVERETT W. HEPP,

United States Attorney,

Fairbanks, Alaska,

Attorney for Plaintiff.

QUINCY W. BENTON,

Fairbanks, Alaska,

Attorney for Defendants.

JULIEN A. HURLEY,

Fairbanks, Alaska,

Attorney for Defendants.

PROCEEDINGS

Before: Hon. Harry E. Pratt,

District Judge.

Be It Remembered, that upon the 3rd day of
November, 1950, at 10:00 o'clock a.m., the above-

named defendants were present in court in person and represented by their attorney, Mr. Quincy Benton and the plaintiff represented by Mr. Everett W. Hepp, United States Attorney; the Honorable Harry E. Pratt, District Judge, presiding;

The Court: Time set for trial, cause number 1507 criminal, United States against Raymond Wright, et al. Counsel ready?

Mr. Hepp: Government's ready.

The Court: Very well. Enter the names of the jurors in the box.

Mr. Benton: If your Honor please, at this time, I would like to have Mr. Hurley's name entered as associate counsel.

The Court: May be so entered.

(Whereupon, twelve prospective jurors' names were drawn and entered the box.)

Clerk of the Court: Box is full, your Honor.

(The prospective jurors were sworn by the Clerk of the Court and thereupon examined by Mr. Hepp and Mr. Benton until 12 o'clock noon.)

(The court duly admonished the Jury and the trial of this cause was recessed until 2 o'clock p.m.) [1*]

(At 2 o'clock p.m., November 3, 1950, came all parties as heretofore, respective counsels, defendants in person and members of the regular panel of the Petit Jury excepting those al-

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

ready excused from the trial of this cause, and the trial of this cause was resumed.)

(A jury was duly empaneled and sworn.)

The Court: Proceed with the opening statements.

Mr. Hepp: At this time, your Honor, I would like to have the witnesses placed under the rule.

The Court: All witnesses will remain out of the courtroom until called to testify. Any witnesses in the courtroom will go outside the courtroom and remain out until called.

(Mr. Hepp presented his opening statement to the Court and Jury.)

(Mr. Benton presented his opening statement to the Court and Jury.)

The Court: Take a recess until five minutes after three.

(At this time, a short recess was taken.)

The Court: Call the roll of the jury.

Clerk of the Court: They are all present your Honor.

The Court: Counsel ready to proceed with the trial of this case? [2]

Mr. Hepp: Ready.

Mr. Benton: Ready.

Mr. Hepp: Call Vanada Donaby.

VANADA DONABY

called as a witness in behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hepp:

Q. Would you state your name to the jury please? A. Vanada Donaby.

Q. How old are you, Vanada? A. 23.

Q. When were you 23?

A. November 16th.

Q. Have you ever lived here around Fairbanks?

A. Yes, I have.

Q. When did you come to Fairbanks?

A. In February.

Q. February of what year? A. Of '50.

Q. Where had you lived before you came to Fairbanks? A. Seattle, Washington.

Q. Were you born and raised there?

A. No, I wasn't.

Q. Where were you born? [3]

A. Murphysborough, Illinois.

Q. Spent quite a bit of your life, though, in Seattle, have you?

A. I have been there ever since '44.

Q. When did you say you came to the Territory?

A. February.

Q. Did you work after you came to the Territory? A. Yes, I did.

Q. Where did you work?

A. Triple X Barbecue.

Q. Is that on Cushman Street, South Cushman?

A. Yes.

(Testimony of Vanada Donaby.)

Q. How long did you work there, Vanada?

A. I worked there from February until first part of April. I don't remember.

Q. Did you leave that place?

A. At that time?

Q. Did you leave the Triple X the first part of April?

A. Yes, I did.

Q. Do you know Raymond Wright, the defendant, here?

A. Yes, I do.

Q. Do you know Vernestine Wright, the other defendant?

A. Yes, I do.

Q. When did you first meet Raymond Wright?

A. Oh, shortly after I came to Fairbanks. [4]

Q. How did you happen to meet him?

A. Oh, first time I had ever seen him was in Seattle.

Q. Oh, I see.

A. Last year.

Q. Last year?

A. Uh-huh.

Q. Did you see him while you were working at the Triple X Cafe?

A. Yes, I did.

Q. Why did you leave the Triple X Cafe?

A. Well, the lady that I was working for, she left town.

Q. Who was that?

A. Eleanor Jones.

Q. Was she the one you were working for?

A. Yes, she was.

Q. Did the Triple X close up or something?

A. No. She just left town. She was having some kind of trouble with her partner.

Q. Who was her partner?

A. Eva Kelly.

Q. And did you say whether or not you saw Ray-

(Testimony of Vanada Donaby.)

mond Wright during the time that you were working at the Triple X? A. Yes, I did.

Q. Where did you move to—did you work after you left the Triple X Cafe? [5]

A. Yes, I did.

Q. Where was this work?

A. Club 69.

Q. Who owns that?

A. Raymond Wright and Vernestine Wright.

Q. How—

Mr. Benton: I object to that and I want the answer stricken, your Honor. There has been no foundation laid as to who owns that and it's strictly a conclusion on the part of the witness. Unless there is a foundation laid as to who owns that property, then the answer should be stricken.

The Court: All right, objection sustained.

Q. (By Mr. Hepp): Who is living at the Club 69—who was living at the Club 69 when you went out there, Vanada?

A. Raymond Wright and Vernestine Wright.

Q. Did either of them ever make any statement to you as to who owned the Club 69?

A. No. I don't remember that.

Q. Did you ever see anybody else out there that had any control of the premises other than Mr. Wright and Vernestine Wright?

A. No, I didn't.

Q. How is it—under what circumstances Vanada did you go out to the Club 69? [6]

A. Raymond Wright taking me out there.

(Testimony of Vanada Donaby.)

Q. Had he talked to you concerning your going out there? A. Yes, he has.

Q. What did he say in that regard?

A. Well, he got me a room and he paid my room rent and he had also given me money to go to the doctors because I had been sick and I didn't have no money.

Q. Did he offer you a place to stay, Vanada?

A. Yes, he did.

Q. About what time was that? What day was that? What time of the year was that, Vanada?

A. I don't remember the exact date but it was around the first or middle of April.

Q. Is that of this year? A. Yes.

Q. What did you do when you first went out to the Club 69?

A. Well, the first few nights that I was out there, I didn't do much of anything.

Q. What occurred then? A. Then?

Q. After the first few nights?

A. Oh, well, I entertained men.

Q. How is it that you happened to entertain men? A. That was what I was told to do.

Q. Who told you to do that? [7]

A. Raymond Wright.

Q. What did he say in that regard?

A. Ask for money.

Q. Pardon? A. Ask for money.

Q. You mean you were to—he asked you for money or you had to ask somebody else for money?

A. I was to ask men for money.

(Testimony of Vanada Donaby.)

Q. Why would you need money?

A. Beg pardon?

Q. Why did you need money?

A. Because I didn't have any.

Q. Did Mr. Wright ever ask you for money?

A. Certainly.

Q. What did he say in regard to that, the money and you entertaining men?

A. Well, I had to turn tricks.

Q. Did he say why you had to turn tricks?

A. Yes, he did.

Q. What did he say in that respect?

A. Because he was spending his money. He had to get his money back.

Q. What do you mean by "turning tricks," Vanada? A. Oh, entertaining men.

Q. Where would you entertain the men? [8]

A. In the private room.

Q. Was there any charge made for that entertainment? A. Yes, there was.

Q. How much was charged?

A. Whatever you could get.

Q. What did that usually average?

A. Well, when I first went out there, it was nothing under twenty dollars and later on it became ten and not anything under ten dollars. You get whatever you could.

Q. What did you do with the money?

A. I checked it into Vernestine.

Q. Did you know how to be a prostitute when you went out there, Vanada?

(Testimony of Vanada Donaby.)

A. No, I never had been a prostitute before.

Q. Did anyone on the premises instruct you as to how to be a prostitute? A. Yes.

Q. Who? A. Vernestine.

Q. And you say you gave the money to Vernestine? A. Yes.

Q. Were you allowed to keep any of it yourself?

A. No.

Q. You say—did you say that—what did you say in regards to whether you had any money yourself during this same general [9] time? Did you say whether you had any money yourself?

A. When I went out there?

Q. Yes. A. No, I didn't.

Q. You didn't say or you didn't have any money? Which?

A. No, I didn't have any money.

Q. I see. Did you have any friends in the Territory when you came up here?

A. Eleanor Jones.

Q. You say she was the one that left the Triple X, is that right? A. Uh-huh, that's right.

Q. When she left, did you have any friends?

A. No, I didn't.

Q. You had no money? A. No.

Q. Vanada, why did you go out to the Club 69?

A. Because Raymond Wright asked me to go out there. He kept me out there. He said he was going to give me a job.

Q. Did he say what that job was going to be?

A. No, he didn't.

(Testimony of Vanada Donaby.)

Q. Did you know at the time that you were going out there to be a prostitute?

A. No, I didn't.

Q. Did you like your work as a prostitute? [10]

A. No, I didn't.

Q. How long did you live out there?

A. Until the last of July.

Q. Until the last of July? Did you ever complain to anyone about your having to be there?

A. Yes, I did.

Q. Did you ever ask either of the defendants whether you could leave?

A. I never asked Vernestine.

Q. Did you ask Raymond? A. Yes, I did.

Q. What did he say? A. He said, "No."

Q. Did he say why?

A. He said I just wasn't going.

Q. Did you ever complain to anyone else as to your being there?

A. Yes, to various people.

Q. Were any of them law officers?

A. No, no law officers.

Q. Did you ever complain to the law?

A. No, I didn't.

Q. Why? Was there any particular reason?

A. Well, I didn't want to cause any trouble is the first reason and too, I was afraid. [11]

Q. What were you afraid of?

A. Well, because he said he bossed the town, he had everybody paid off.

(Testimony of Vanada Donaby.)

Q. Did Mrs. Wright ever say anything to you regarding that? A. Regarding what?

Q. Your leaving there? A. No, she didn't.

Q. She never mentioned that to anyone?

A. No, she didn't.

Q. At the time you were living out at the Club 69, how many other people were living there?

A. Three others.

Q. What were their names?

A. Vernestine's cousin and Nathaniel Wood and Willa May, and myself.

Q. Willa May what?

A. Walters I guess or Walkers or something.

Q. Did you ever ask anybody to help you get away from there? A. Yes, I did.

Q. Who did you ask?

A. Bill Jones and Nathaniel Wood.

Q. Had you ever—before that, had you ever asked anybody to—about your going away?

A. No. I had talked to different girls that was working out there. [12]

Q. Did you get any satisfaction from those conversations? A. No, I didn't.

Q. Was there any particular reason for that?

A. Why no satisfaction?

Q. Yeah.

A. Well, I imagine they were afraid too.

Q. Do you know any colored people who are in town who are not afraid of Mr. Wright?

Mr. Hurley: We object—(Interrupted).

Mr. Benton: I object to that, your Honor. That's

(Testimony of Vanada Donaby.)

strictly a conclusion.

The Court: Objection sustained.

Q. (By Mr. Hepp): Have you ever been arrested Vanada? A. No—(Interrupted).

Mr. Hurley: We object to that—I withdraw that.

Witness (Continuing): I haven't.

Mr. Hurley: What was the answer?

(The last answer was read by the reporter.)

Q. (By Mr. Hepp): Are you married, Vanada?

A. No, I'm not.

Q. I believe previously you mentioned something about Mr. Wright asking you to come out to the Club 69. Do you recall [13] what he said about that when he first talked to you concerning it?

A. No, I don't.

Q. You recall any of his statements at any time or the substance of his statements concerning you going out to the Club 69? A. No, I don't.

Q. But you state that you had—you didn't know that you were going to be a prostitute when you went there? A. No, I didn't.

Q. While you were out there, did you want to leave, Vanada? A. Yes, I did.

Q. How soon after you got out there did you want to get away?

A. Shortly after I was out there.

Q. About how long?

A. Oh, I would say about 3 or 4 weeks.

Q. And you state that you never been a prostitute before, is that right? A. No, I haven't.

(Testimony of Vanada Donaby.)

Q. Did all this occur around the middle of April, did I hear you say?

A. Yes, when I first went out there.

Q. Could it have been the 14th day of April?

A. I don't know. It could have. I don't know. I don't [14] remember the date.

Mr. Hepp: You may question the witness.

Cross-Examination

By Mr. Benton:

Q. Did you state that you were unmarried?

A. Yes, I did.

Mr. Benton (To Clerk): I would like to have this marked for defendants' identification.

Clerk of Court: This page or—— (Interrupted.)

Mr. Benton: Just the page. If necessary, you can mark the whole works later.

Clerk of Court: Defendants' identification "A."

(The first page of a hotel register for the Clark Rooms was introduced by defendants for identification and marked Defendants' identification "A.")

Q. (By Mr. Benton): I hand you this book and ask you to look at the next to the last name on this page and ask you if you have ever seen that before? Take a look at it. A. Yes, I did.

Q. Is that in your handwriting?

A. Yes, it is.

Q. Will you please read it to the Court?

Mr. Hepp: Just a minute. I object to [15] that

(Testimony of Vanada Donaby.)

your Honor. I don't know that it is admissible at all and I don't believe it should be read until I've had an opportunity to look at it.

The Court: Show it to counsel.

Mr. Benton: You want to look at it? (Handing book to Mr. Hepp.) You have any objections?

Mr. Hepp: No, I haven' any objections.

Q. (By Mr. Benton): Were you married at the time you signed that?

A. No, I wasn't. That was the way—— (Interrupted.)

Q. Wait a minute. Just answer my question.

A. No—that's my name.

Mr. Benton: I offer this as defendant's exhibit—— (Interrupted.)

Mr. Hepp: Just a minute. I would like to question—I don't believe that counsel gave her an opportunity to explain her answer.

The Court: You are correct.

Witness: That was the way that Raymond Wright instructed me to sign the register when he got me the room at the hotel.

Mr. Benton: I object to that, your Honor. There is no foundation laid for that. She has admitted she signed this.

The Court: Objection overruled. [16]

Q. (By Mr. Benton): But you did sign this, is that right?

A. Yes. I signed it. I was instructed to sign it that way.

(Testimony of Vanada Donaby.)

Q. Well, you stated that you were not married at the time.

A. That's my name, Donaby, and I was instructed to sign it that way, Mr. and Mrs. Donaby.

Q. You remember the date?

A. No, I don't remember the date.

Q. Now, at what time did you come to the Territory of Alaska?

A. Oh, it must have been around about February third, first of February.

Q. Now, isn't it a fact that you testified a while ago that it was the first or the middle of April?

A. That's when I went out to the Wright's the first of April.

Q. What were you doing on the 6th day of March, 1950? A. I don't remember.

Q. Were you working?

A. I don't remember.

Q. How long were you in the Territory before you went to work?

A. Before I went to work out to the Wright's or the Triple X? Which one do you mean?

Q. How long had you worked before you went to work out at [17] the Wrights?

A. I started sometime in February at the Triple X. I don't remember the date.

Q. You started in at the Triple X in February?

A. That's right.

Q. How long did you work there?

A. Until I went out there.

Q. Until you went out where?

(Testimony of Vanada Donaby.)

A. Out to the Wright's.

Q. And what time did you go out there?

A. I worked at the Triple X until—I don't remember the date, but it was sometime in March. I don't know.

Q. Do you remember the date in March that you went to the Triple X?

A. That I stopped working at the Triple X? No, I don't know.

Q. Now, where were you born, Vanada?

A. Murphysborough, Illinois.

Q. Do you remember the date?

A. Of course!

Q. You remember that of your own knowledge?

Mr. Hepp: Now, I object to that, your Honor. I don't know how anybody else would remember something. That's an impossible question.

Mr. Benton: If your Honor please, I am [18] asking the witness a question.

Mr. Hepp: And I am objecting to it.

The Court: Objection overruled.

Q. (By Mr. Benton): You just stated that you remembered the date? You remember the date of your birth, is that right? A. Yes, I did.

Q. And do you remember when you came to Seattle; if you did come to Seattle?

A. I don't remember the date, no.

Q. Well, were you ever in Seattle?

A. Yes, I live in Seattle.

Q. And are you married?

A. No, I am not married.

(Testimony of Vanada Donaby.)

Q. Well, did you work in Seattle?

A. Yes, I did.

Q. And where did you work?

A. My last job, on the job that I work on now is the Sea Gull Tavern.

Q. Did you ever work any place else in Seattle?

A. Yes, I did.

Q. Where else?

Mr. Hepp: I object to further questions unless they can show the relevancy here. They can go on and on in this former history. [19]

Mr. Benton: I will make an offer of proof, your Honor.

The Court: Very well.

(The following proceedings were had out of the hearing of the jury.)

Mr. Benton: If your Honor please, I am going to introduce this, the affidavit that was filed in the abatement case and I am testing her credibility.

The Court: Whose affidavit?

Mr. Benton: Vanada Donaby, by Vanada Donaby and this is an official copy and it is signed right there. I want to test her credibility.

Mr. Hepp: I have no objection. She said the same thing she said in here. I don't see that this instrument—she said she was born in Illinois. She said she came to Seattle before about 1944 and she didn't remember the date. There is nothing contradictory so far as I can see and I don't see that this has anything—— (Interrupted.)

(Testimony of Vanada Donaby.)

Mr. Benton: I want to introduce this—— (Interrupted.)

The Court: Well—— (Interrupted.)

Mr. Hepp: I object to the introduction of that, your Honor.

The Court: Yes. This is not admissible but you can ask the questions if she did work at this place and [20] if she did these other things and if she disputes it, then it might be admissible.

Mr. Benton: That's the offer of proof I am making right now.

(The following proceedings continued in the presence and hearing of the jury.)

Q. (By Mr. Benton): You have stated that you are not married? A. Yes, I did.

Q. Have you ever been married?

A. Yes, I have.

Q. When were you married? A. In '44.

Q. You were married in 1944? A. Yes.

Q. And to whom were you married?

A. Welton Spencer Wiry.

Q. And can you tell me where you lived after you were married?

A. Oh, I lived at various places in Seattle.

Q. Is there any certain place that you lived?

A. 1909 East Spruce.

Q. Now, are you still married to this man?

A. No, I'm not.

Q. Have you ever been—are you divorced from him? [21] A. Yes.

Q. And will you tell me when you were divorced?

(Testimony of Vanada Donaby.)

A. '47.

Q. Can you tell me the month?

A. No, I don't remember the month.

Q. Now then, why did you come to the Territory of Alaska?

A. Because I had a job.

Q. You had a job before you came to the Territory of Alaska?

A. Yes, I did.

Q. Do you mind telling me how you obtained that job?

A. Because I wrote to Eleanor Jones and asked her for it.

Q. And what kind of a job did you ask for?

A. Waitress job.

Q. And what kind of work did you do?

A. Waitress.

Q. Can you tell me the periods when you started on that job and when you finished that job?

A. I don't remember.

Q. You can't remember when you worked for Eleanor Jones?

A. I don't remember the dates.

Q. Do you have any idea at what time you worked for Eleanor Jones?

A. Well, first of—or the middle of February until sometime in March.

Q. What time in March did you work for [22] her?

A. I don't remember the dates.

Q. Now, after you came to Alaska and after you started to work for Eleanor Jones, what did you do then?

A. Waitress.

Q. For whom?

A. Eleanor Jones.

(Testimony of Vanada Donaby.)

Q. Do you know the defendants here?

A. Yes, I do.

Q. Can you tell me when you met them?

A. I don't remember the date.

Q. Well, you have no idea when you met the defendants?

Mr. Hepp: I object to that, your Honor. I don't think that's a fair re-statement. She merely says she doesn't remember the date. That doesn't mean——
(Interrupted.)

The Court: Objection sustained.

Q. (By Mr. Benton): Did you have any money when you came to the Territory of Alaska?

A. Yes, I had some.

Q. How much money did you have when you arrived in Alaska?

A. I don't remember the exact amount.

Q. Well, approximately how much?

A. I don't remember the exact amount.

Q. Do you remember how much you had when you left Seattle?

A. I don't remember the exact date— [23] amount.

Q. Do you have any idea how much you had before you bought your ticket in Seattle?

A. I don't remember.

Q. Do you remember how you came up, by boat, plane or over the highway?

A. I came by plane.

Q. Do you know how much a ticket costs?

A. Yes, I do.

(Testimony of Vanada Donaby.)

Q. Do you know how much money you had left after you bought your ticket?

A. No, I don't remember how much.

Q. By what airline did you come to the Territory? A. Oh—— (Interrupted.)

Q. Do you remember the airline upon which you travelled? A. No, I don't.

Q. Do you remember the price of your ticket?

A. Oh, I don't remember that.

Q. Did you pay for it? A. Yes, I did.

Q. Do you have a receipt?

A. No, I don't have the receipt with me. I don't even know where it is.

Q. Now, after you went to work for Eleanor Jones, did you work for nothing or were you paid money? A. I was paid.

Q. And by whom were you paid? [24]

A. Eleanor Jones.

Q. And what was your salary?

A. Well, she wasn't paying me a salary. She was just paying something because I didn't have to pay no room and board. I was living with her.

Q. Well, can you give me an idea of about how much you earned while you were working for Eleanor Jones?

A. Well, business was slow and she was a friend of mine. I didn't have to pay no room and board, so, just whatever she could afford to give me, I accepted that.

Q. Can you give me an idea how long you worked for her?

(Testimony of Vanada Donaby.)

A. From some part of February until March.

Q. Well, would you say from the middle of February to the middle of March?

A. I don't remember the dates.

Q. Would you say for two months?

A. I don't remember the dates.

Q. Would you state the amount that you made in any one week?

A. Well, she wasn't paying me no salary.

Q. In other words, you were working for your room and board, is that right?

A. No. She was giving me money but it wasn't a salary because business was slow and she couldn't afford it.

Q. She couldn't afford to pay you a salary? [25]

A. Yeah.

Q. And then—but she did pay you something?

A. Yes.

Q. Did you work—will you describe to the Court the building in which you worked?

A. Oh, it is just like any cafe would be I suppose, barbecue place.

Q. Is that the only building upon those premises? Is that the only building upon the premises?

A. No, it isn't.

Q. Did you work in over one building?

A. I worked in the cafe.

Q. And you never worked in any other building?

A. No, I haven't.

Q. Now, how many other buildings were there on those premises?

(Testimony of Vanada Donaby.)

A. Well, there's lot of buildings around. I don't know how much was her's.

Q. Did she ever take you into any of the other buildings? A. Yes, she did.

Q. Would you state how many other buildings she took you into?

A. She never took me but into one.

Q. Will you describe that building?

A. Oh, it was a cabin in the back. [26]

Q. Will you describe the furnishings of that cabin in the back?

A. There was no furniture in it.

Q. You mean it was a vacant building?

A. No. I mean there wasn't nothing in it to describe.

Q. Was there a—was there a stove in it?

A. Yes, there was an oil stove.

Q. And was there a chair in it?

A. Yes, I think so. I don't know. I know there was a stove in it because it was cold.

Q. Was there a bed in it?

A. Yes, I think so. There was.

Q. Would you tell me the size of the bed?

Mr. Hepp: Your Honor, I am going to object to further questioning here—— (Interrupted.)

Mr. Benton: If your Honor please, I will make an offer of proof on that.

The Court: Come forward and make it.

(The following proceedings were had out of the presence and hearing of the jury:)

(Testimony of Vanada Donaby.)

Mr. Benton: Now, if your Honor please, the size of the building, the size of the bed, the dimensions, all add up the truth of this witness. It also adds up that in certain kinds of places they don't have full size beds. I want to find out about [27] that.

Mr. Hepp: I don't see the association of that to this—— (Interrupted.)

Mr. Benton: I do. I am going to show before this trial is over that the woman is a prostitute. I have a right to bring up everything that I can to prove that.

Mr. Hepp: I believe then, your Honor, I am going to insist that he make her his witness. I don't think that this is proper cross-examination. I don't believe that it is by any stretch of the imagination connected with the matters before this court and it has gone to the point where it can no longer be an impeachment or an attempt to impeachment.

Mr. Benton: Your Honor, I am not—— (Interrupted.)

The Court: Have you got an affidavit where she shows those things?

Mr. Benton: I have an affidavit where she sets out where she worked and how much money she had and I am trying to show where she got that money and I am trying to find out whether she got—— (Interrupted.)

The Court: Well, this is cross-examination. You can ask her if she didn't make this statement and show it to her.

(Testimony of Vanada Donaby.)

Mr. Benton: I can also show the bias of the witness. I am not trying to impeach the witness. I am [28] trying to show her bias.

Mr. Hepp: There is nothing in here about a building.

The Court: I have heard your offer. Now ask her a question and I will rule on it.

(The following proceedings continued in the presence and hearing of the jury:)

Q. (By Mr. Benton): Now, you have stated, isn't it true, that you weren't being paid wages when you worked for Eleanor Jones?

Mr. Hepp: I object to that, your Honor. She didn't state that at all. She said no certain sum; that she was getting money for working there and that's not the testimony at all.

Mr. Benton: She said she wasn't paid wages.

The Court: Well—— (Interrupted.)

Mr. Hepp: Your Honor remembers what she said concerning that.

Mr. Benton: Let's read the record.

The Court: I will sustain the objection.

Mr. Benton: Exception.

Q. (By Mr. Benton): Did anything happen to interrupt your employment at the Triple X while you worked for Eleanor Jones? [29]

A. I don't understand. Would you repeat it?

Q. Did anything happen to interrupt your employment while you were working for Eleanor Jones at the Triple X?

(Testimony of Vanada Donaby.)

Mr. Hepp: I object to that to, your Honor, unless he states what kind of interruption he is talking about. She could say—it might develop that she was sick for five minutes and left her duty and that actually is an interruption and if he is trying—
(Interrupted.)

The Court: I think you should be more specific. I will sustain the objection.

Mr. Benton: All right!

Q. (By Mr. Benton): Was Eleanor Jones put in jail while you were working for her?

A. Yes, she was.

Q. Did she have any money when she was put in jail?

A. Oh, she had some I guess and I loaned her some.

Q. Did she have enough money?

A. I don't know that. She got out.

Q. Did you loan her money?

Mr. Hepp: I object to the tone that counsel is using to this witness. I think he can slack off and ask a question in a proper manner.

The Court: Yes, objection sustained. [30]

Q. (By Mr. Benton): Did you loan Eleanor Jones any money? A. Yes, I did.

Q. Can you state the amount?

A. Well, it was 150 or either 160, something like that. It was one hundred and something.

Q. Can you tell the court and jury where you got that money? A. Working.

Q. At what were you working?

(Testimony of Vanada Donaby.)

A. Working at the Triple X and I had some money when I came.

Q. Now can you state how much money you had when you came?

A. Well, I don't know how much money I had when I came and I also received money from home.

Q. Now, when you say you received money from home, will you explain that? Was that from——
(Interrupted.) A. From Seattle.

Q. Well now, was that from a man, from a woman?

Mr. Hepp: I object to any further question where this money came from or anything unless it can be shown to have a relation to this trial. Counsel is merely on a long fishing expedition to possibly tie this witness up. Why we will be here until next month.

The Court: Overruled. Answer the [31] question.

Q. (By Mr. Benton): Can you state from whom you received the money?

A. Certainly.

Q. Will you state the party's name, please?

A. Evelyn Howell.

Q. And can you state the occupation of this party?

Mr. Hepp: Now, I object to that, your Honor. I don't see that that has any relation to this trial, the occupation of somebody who sends her some money.

The Court: Objection sustained.

(Testimony of Vanada Donaby.)

Mr. Benton: Exception.

Mr. Hepp: That's not necessary under the new rules, Mr. Benton.

Mr. Benton: I want it in the record, Mr. Hepp.

Q. (By Mr. Benton): How long have you known this lady from Seattle who sent you the money?

A. We have been friends for three or four years.

Q. Well, did you ever work together?

A. Yes, we did.

Q. Did you ever play together?

A. Ever do what?

Q. Play together?

A. We used to go bowling together if that's what you mean. [32]

Q. Well now, will you tell me at what you worked together?

A. Bar maid, Sea Gull Tavern.

Q. And for whom did you work in the Sea Gull Tavern? A. Alvin Louis.

Q. Can you state the owner of the Sea Gull Tavern?

Mr. Hepp: I object to that. I don't think that that's got any basis to the relation of this trial.

The Court: I think that is going beyond the realm—— (Interrupted.)

Mr. Benton: I will make an offer of proof, your Honor.

(The following proceedings were had out of the presence and hearing of the jury:)

(Testimony of Vanada Donaby.)

Mr. Benton: Your Honor, I know who owns the Sea Gull Tavern.

Mr. Hepp: That's not in evidence, your Honor, and—— (Interrupted.)

Mr. Benton: It will come into evidence and I want to show that the party that owns the Sea Gull Tavern is a husband of Eleanor Jones and this woman was sent up here as a prostitute. That is what I am intending to prove.

Mr. Hepp: Your Honor, he is not proving it by this witness by the questions he is asking.

Mr. Benton: She denied everything I [33] asked—— (Interrupted.)

Mr. Hepp: I object to him trying to establish a new and different proposition with someone else's witness. If he wants to introduce this phase in this fashion, why, I think he should—— (Interrupted.)

Mr. Benton: I think it is proper cross-examination.

The Court: Does she state any such thing as that in this affidavit?

Mr. Benton: No. I am using this affidavit as a——partly a guide for my questioning but it is proper cross-examination because she has claimed and she has set forth in this affidavit that she has never worked as a prostitute, that she is a very nice girl and so forth like that. I want to use the same affidavit to prove that she is absolutely false in her statements.

Mr. Hepp: Your Honor, he is going right on down the line and I will ask your Honor to read

(Testimony of Vanada Donaby.)

this affidavit if you need to be convinced if she corresponds with this affidavit.

Mr. Benton: She lied that she was married and—— (Interrupted.)

The Court: You want to put that—you will have that marked for identification if you are going to use it? [34]

Mr. Benton: A while ago, you told me that I could not use it, but I could not—— (Interrupted.)

The Court: I didn't say that. I said that—— (Interrupted.)

Mr. Benton: But I want to cross-examine her on the basis of this.

The Court: Well—I can't rule on things like that. You ask a question and I will make a ruling.

Mr. Benton: All right. Your Honor, how about a ten minute recess?

The Court: Go on until four.

(The following proceedings continued on in the presence and hearing of the jury:)

Q. (By Mr. Benton): Now, when you came to Alaska to work for Eleanor Jones, did you know what kind of business Eleanor Jones was in?

A. She had wrote and said so.

Q. Do you know Eleanor Jones' husband?

A. Yes, I do.

Q. And where did you know him?

Mr. Hepp: I object to that, your Honor. This is getting way beyond the issues of this case here and goes into a matter that so far there is no rela-

(Testimony of Vanada Donaby.)

tion shown. I object to the question for that reason, irrelevant—— (Interrupted.) [35]

The Court: Objection sustained.

Q. (By Mr. Benton): You stated that you went out to work at the Club 69, is that right?

A. Yes.

Q. And did you stay out there?

A. Would you mind repeating the question please?

Q. Did you stay at the Club 69 from the time you started to work there? A. No, I didn't.

Q. Will you state where you lived?

A. At the Clark Rooms.

Q. I didn't get that answer.

A. At the Clark Rooms.

Q. The Clark Rooms?

A. I guess that's the name. I don't know.

Q. You are not sure?

A. No, I am not sure but it is down here on Fourth.

Q. Well, did you live anyplace else on Fourth?

A. When I first came, I lived with Eleanor Jones.

Q. And where did she live? A. 650 4th.

Q. Can you tell me when you went to live with Eleanor Jones?

A. When I first came to Alaska, I came to Alaska to live [36] with her.

Q. And how long did you live with her?

A. I don't remember. Until when I went to the Clark Rooms. I don't remember the date.

(Testimony of Vanada Donaby.)

Q. Can you state what Eleanor Jones did when you lived with her on Fourth Avenue?

Mr. Hepp: Your Honor, I object to that as purely repetitious. Counsel has asked this before and this witness has stated that she ran the Triple X Barbecue or owned it or something.

The Court: Objection overruled.

Q. (By Mr. Benton): Can you state anything that you saw going on in Eleanor Jones' house on Fourth Avenue while you lived there?

Mr. Hepp: I object to that, saw anything going on. There's millions of things everyday. She could go on for hours.

The Court: Objection sustained. This is cross-examination.

Q. (By Mr. Benton): What was the business of Eleanor Jones?

A. Triple X Barbecue.

Q. No, I mean on Fourth Avenue?

Mr. Hepp: I object to that. There's no evidence showing that she had any business on Fourth [37] Avenue. Counsel is trying to bring this in as a red herring.

The Court: Objection sustained.

Mr. Benton: Your Honor, that wasn't a red herring. I'll ask one more question.

Q. (By Mr. Benton): Do you know, or isn't it a fact, that Eleanor Jones was running a bawdy house on Fourth Avenue when you lived there with her?

A. No, she wasn't. If she did, I don't know.

(Testimony of Vanada Donaby.)

Q. Now, we come back to the prior question. Just what was she doing there?

A. That's where she lived.

Q. Will you describe the premises?

Mr. Hepp: I object to that, your Honor unless he can show what bearing that has on this case. We are way off of the issues here and he is just trying to lead us further astray, your Honor, and I think in the interest of expediency alone he should limit these questions.

Mr. Benton: I will make another offer of proof, your Honor.

The Court. I will overrule the objection.

Mr. Benton: Mr. Reporter, will you read that question over please?

(The reporter read the question as follows:

“Q. Will you describe the premises?”) [38]

Witness: Beg pardon?

Q. (By Mr. Benton): Describe the premises—
(Interrupted).

A. It was a house.

Q. Well, state what was within that house, how many rooms and how it was furnished?

A. There was a kitchen and a bedroom and a frontroom, just like any other house would have furniture in it; stove, cook stove, icebox, bed, couch, chairs.

Q. How much—could you state what was in the icebox, the frigidaire at any definite time?

Mr. Hepp: Your Honor, I object to that. He

(Testimony of Vanada Donaby.)

hasn't even stated the time that he wants her to say. I think he should——(Interrupted.)

Mr. Benton: At any time that she was there.

Mr. Hepp: Your Honor, I think——

(Interrupted.)

The Court: Objection sustained.

Q. (By Mr. Benton): Alright now. Will you tell the court and the jury and the District Attorney and counsel in which direction did the living room face?

A. I am not good on directions. I don't know.

Q. Well now, can you state in which direction the kitchen [39] faced or in which direction it was?

A. The house is sitting right on Fourth and if you walk in, you walk into the kitchen and the bedroom and then the living room and the direction I don't know.

Q. Did you ever walk out of the living room away from Fourth Avenue?

A. Did I ever walk out of the living room away from Fourth? Would you ask that question again? I don't understand you.

Q. You have stated that when you walk into the house you walk from Fourth Avenue into the kitchen, is that right? A. Yes.

Q. Well now, in the event that you walk out of the living room, into where do you walk?

Mr. Hepp: I am going to object to this unless counsel can show what bearing it has on this case, your Honor.

(Testimony of Vanada Donaby.)

Mr. Benton: I want to know where she gets when she walks out of that room.

Mr. Hepp: Until he shows the relation to the issues before this court, I object to it. It is irrelevant.

Q. (By Mr. Benton): Does the living room——
(Interrupted.)

Mr. Hepp: Just a minute. [40]

Q. (By Mr. Benton) (Continuing): Does the living room face on the alley or upon Fourth Avenue?

A. When you walk out of the living room, you walk into the alley.

Q. That's what I wanted to know. Are you acquainted with the—with Fourth Avenue?

A. No, I'm not.

Q. How long did you live with Eleanor Jones?

A. From the time that I first came to Fairbanks until sometime in March or something. I don't remember the date.

Q. And you lived with her from the time that you came to Fairbanks until you went out as you have stated before to the Club 69——(Interrupted.)

A. Until I got the room at the Clark Rooms.

Q. Until you got a room at the Clark Rooms. Alright now, how long a time was that?

A. I don't remember the date.

Q. But you did live with Eleanor Jones on Fourth Avenue during that period of time, is that right?

A. During what period of time?

(Testimony of Vanada Donaby.)

Q. From the time you came to Fairbanks until the time you moved to the Clark Rooms?

A. Yes.

Q. Have you any idea of the length of time? [41]

A. I don't remember the date.

Q. Well, did you live there a week?

A. You have the register there when I got the room at the Clark Rooms. You should know.

Q. How long did you live on Fourth Avenue in Fairbanks, Alaska?

Mr. Hepp: I object to the implications of that statement, your Honor.

Mr. Benton: Your Honor, I don't know of any implications.

Mr. Hepp: He has asked her five times that very same question and each time he is trying to rephrase it and introduce prejudicial matters.

Mr. Benton: I never got an answer to the length of time.

The Court: I think that has been answered enough. I will sustain the objection.

Q. (By Mr. Benton): Can you tell me at what time you left the Clark Rooms?

A. I don't remember.

Q. I mean the day of the month, the month and the day and the year?

A. I don't remember the date.

Q. Just where did you go when you left the Clark Rooms? A. Club 69. [42]

Q. And do you have any idea of the approximate date? A. I don't remember.

(Testimony of Vanada Donaby.)

Q. You can't remember at all when you left the Clark Rooms, is that right?

A. I don't remember the exact date, no.

Mr. Benton: If your Honor please, I would like a ten minute recess.

The Court: We will recess until quarter past four.

Clerk of the Court: Court is recessed until quarter past four.

(At this time, the trial of this cause was recessed for ten minutes.)

The Court: Call the roll of the jury.

Clerk of the Court: They are all present, your Honor.

The Court: Counsel ready to proceed with this trial?

Mr. Hepp: Ready, your Honor.

Cross-Examination

(Continued)

By Mr. Benton:

Q. Mrs. Donaby—— (Interrupted.)

A. Miss.

Q. I beg you pardon. When you worked for Eleanor Jones, isn't it a fact that you knew that she was operating a house [43] of prostitution?

Mr. Hepp: I object to that, your Honor. There is no evidence here that Eleanor Jones was operating a house of prostitution and the inferences here are completely misleading.

The Court: Objection sustained.

(Testimony of Vanada Donaby.)

Q. (By Mr. Benton): Did you know what business Eleanor Jones was in when she told you to come up here and work for her?

A. She hired me as a waitress. She told me to come up as a waitress in the Triple X.

Q. And all you did when you came up here was to work as a waitress, is that right?

A. That's right.

Mr. Benton: That's all.

Mr. Hepp: This ended rather abruptly, your Honor. May I have just a minute. Oh, I have no further questions at this time, your Honor.

The Court: That's all then.

(Vanada Donaby left the witness stand.)

The Court: Call your next witness.

Mr. Hepp: I already summoned them your Honor. They are getting them. [44]

WILLIAM JONES

called as a witness in behalf of the government,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Hepp:

Q. Would you state your name please?

A. William Jones.

Q. Would you speak a little slower so that people can catch every word. What is your name again please?

A. William Jones.

Q. How old are you, Mr. Jones?

A. 39 years old.

(Testimony of William Jones.)

Q. Where do you live?

A. In Los Angeles, California.

Q. Have you ever lived in Fairbanks?

A. Yes, sir.

Q. During what period of time did you live in Fairbanks?

A. From the 30th of May until around about the 5th of August.

Q. Where did you live?

A. 801 21st street.

Q. That is the only residence that you had here in Fairbanks, is it?

A. Yes, sir.

Q. Did you know the defendant, Raymond Wright? [45]

A. I did.

Q. Did you know the other defendant, Vernestine Wright?

A. I did.

Q. Under what circumstances did you come to know them, Mr. Jones?

A. Through a friend of Mr. Wright's.

Q. You mean you were introduced through a friend of Mr. Wright's?

A. That's right.

Q. Did you ever enter into any business or other relations with Mr. Wright?

A. Only plumbing business.

Q. When did this occur, Mr. Jones?

A. Oh, in June. I did a job on his new home, two story house and then after that I did another job for him on his Club 69.

Q. Do you know a person named Vanada Donaby?

A. I do.

Q. Where did you meet her?

(Testimony of William Jones.)

A. At Mr. Wright's Club 69.

Q. Was that during the period that you worked out there?

A. That was during the period—the time I was doing the plumbing for Mr. Wright.

Q. How long did that job take?

A. On that job in particular, I worked there about a week [46] in my spare time because I was working out to Wein's Air Force—Air Base. In the daytime I would go there and in the evenings and work sometimes 12 to 1 o'clock, 2 o'clock in the morning and on Saturdays and Sundays I worked there.

Q. Are you married, Mr. Jones?

A. I am.

Q. Family? A. Three children.

Q. Did you ever see Vanada Donaby out at the Club 69? A. I have.

Q. Do you know what she was doing there?

A. Yes, sir.

Q. What was she doing?

A. Working as a prostitute.

Mr. Benton: Your Honor, I object to that. I want the foundation laid for that statement.

The Court: Alright, lay the foundation.

Mr. Benton: And I move that the answer be stricken.

The Court: The answer may be stricken.

Witness: During the time—may I speak?

Q. (By Mr. Hepp): Well, does it relate to the question that is before you? [47]

(Testimony of William Jones.)

A. Yes, sir.

Mr. Benton: If your Honor please, he will answer directly to a question.

The Court: Ask him a question.

Q. (By Mr. Hepp): How often did you see Vanada Donaby out at the Club 69?

A. I saw her every time I was there working.

Q. Was that—over what period of time during the day?

A. During any time I was working out there, I seen her.

Q. How many hours a day did you spend out there?

A. As I mentioned before, I was working at Wein Airfeld there and I mostly seen her there in the evenings. Well, several days I wasn't working and I worked out there on the job and I knew then that she was a prostitute from the way that—
(Interrupted.)

Mr. Benton: Just a minute now. How do you know she was a prostitute— (Interrupted.)

Mr. Hepp: Just a minute.

Mr. Benton: We are moving to strike the answer. I object to that your Honor. That is a conclusion unless there is a foundation laid.

The Court: Just which part do you want me to strike?

Mr. Benton: I move to strike the answer that he says that he knew that she was a prostitute. [48]

The Court: Alright, that may be stricken.

Q. (By Mr. Hepp): Did you have occasion

(Testimony of William Jones.)

while you were out at the Club 69 to observe any of the activity of Vanada Donaby?

A. Yes, sir.

Q. What did you see her do?

A. Well, I have seen her from washing dishes or on down to drying, from cooking to having sexual intercourse with soldiers; men of all sorts, whoever come there and wanted to go to bed with her for that purpose, and not only that, she was also——
(Interrupted.)

Mr. Benton: If your Honor please, I think it requires another question.

Mr. Hepp: Your Honor, I asked him what he had seen her do and he is testifying in answer to that.

The Court: Objection overruled.

Q. (By Mr. Hepp): Go ahead and finish, Mr. Jones.

A. She was also told to make advances toward me when Mr. Wright paid me the \$500 for doing the first job.

Mr. Benton: I object to that, your Honor unless the man was in the hearing of the defendant. Now, I want to know who told her and where and when. That's strictly hearsay, your Honor.

Witness: I am only speaking of the [49] advances she made toward me.

Mr. Benton: I move that the answer that he made be stricken that amounts to when somebody told him that he was supposed to make advances to somebody else.

Mr. Hepp: Your Honor, counsel is confused. He

(Testimony of William Jones.)

wasn't told to make any advances, I don't think.

Mr. Benton: Your Honor, counsel is not confused. Counsel heard the witness, I think properly, when he said that he was told—— (Interrupted.)

The Court: Now then, what is your motion?

Mr. Benton: My motion is to strike the part of his answer where he said that he was told to make advances toward a certain party.

The Court: That he, the witness?

Mr. Benton: That's right, yes.

Witness: You got me wrong.

Mr. Benton: The lady was supposed to make advances toward him.

The Court: That is a different thing.

Mr. Benton: Well, it could happen both ways.

The Court: That part may be stricken unless he heard the—one of the defendants tell her to. Then it would be admissible. [50]

Q. (By Mr. Hepp): Did—Mr. Jones, did you ever hear either of the defendants make any remarks at that time? Just yes or no.

A. Make what sort of remarks?

Q. Oh, well, concerning advances to you?

A. No.

Q. Were any advances made upon you by Van-
ada Donaby?

A. Yes, sir. (Pause) May I go on?

Q. Did you ever hear Mr. or Mrs. Wright, that is, Raymond Wright or Vernestine Wright ever make any statement concerning Vanada's presence out there at the Club?

(Testimony of William Jones.)

A. Well, I have been stopped so much every time I go to talk, I don't know if I should talk or not.

Q. Did you ever—that is alright. You just answer the question. You have been stopped before, don't worry about that. Did you ever hear—would you read that question back, Mr. Reporter?

(The last question was read by the reporter as follows: "Q. Did you ever hear Mr. or Mrs. Wright, that is, Raymond Wright or Verne-stine Wright ever make any statement concerning Vanada's presence out there at the Club?")

Witness (Pause): Yes, I have.

Q. (By Mr. Hepp): What statements—when were the statements made, do [51] you know?

A. From the time I was working there. To say what date, I couldn't say.

Q. Do you recall who was present at the time?

A. Yes, sir.

Q. Who was present at the time—at any time?

A. Raymond and—I mean, Mr. Wright and Mrs. Wright, and Willa May and Opal and Vanada.

Q. What did you hear said?

A. It comes back to the same story again. If I—— (Interrupted.)

Q. Go ahead and just say what you heard said, Mr. Jones. I mean, don't be afraid of these objection. You go ahead and state what you heard.

Mr. Benton: If your Honor please, I object to counsel's remarks. I don't mind him answering a

(Testimony of William Jones.)

question but I am not trying to put any more pressure on him than counsel is using.

The Court: Objection overruled.

Q. (By Mr. Hepp): Go ahead and answer the question, Mr. Jones.

A. Well, I have heard Mr. Wright mention about the girls; and all that, their welfare; and how they were there and weren't going to leave and his different moods and the treatment of these 2 different girls. I have seen things happen there——
(Interrupted.) [52]

Mr. Hurley: We object to that, about the girls—— (Interrupted.)

The Court: Just a minute.

Mr. Hurley (Continuing): Doesn't have anything to do with this case.

The Court: Mr. Hurley, you will examine this witness, will you? You are going to examine him? As you know, our rules require only one attorney to make the questions to cross-examination and I was just asking whether or not you were the one who was going to do it.

Mr. Hurley: Yes, I will examine him.

The Court: Very well, then. All objections will have to come from you.

Mr. Hurley: Alright, your Honor.

The Court: Proceed.

Q. (By Mr. Hepp): Would you answer the question? A. Pardon?

Q. Would you go on stating what you are stating?

(Testimony of William Jones.)

Mr. Hurley: He started talking about some other girls and I objected to that because I don't see where it has anything to do with this case.

Witness: I was asked—— (Interrupted.)

The Court: Objection sustained. [53]

Q. (By Mr. Hepp): Did you ever see any incident occur between Mr. Wright and Vanada Donaby?

Mr. Hurley: We object to that; incompetent, irrelevant, immaterial. I don't know what kind of incident he is talking about.

The Court: Objection overruled.

Q. (By Mr. Hepp): Answer the question.

A. Only the transaction of money. That is the only thing I ever seen go between Mr. Wright and Vanada.

Q. What did you see in that regard?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Q. (By Mr. Hepp): Go ahead and answer the question.

A. Well, I have seen men come in there and talk to her and have a drink or so with her and then start into a room. She walked out, hand the money to Mr. Wright, said "Deposit it in the cash register" and I have seen other girls do likewise.

Mr. Hurley: We move that that be stricken out, your Honor; has nothing to do with the case. This is a very free and willing witness it seems like.

The Court: Alright. [54]

(Testimony of William Jones.)

Q. (By Mr. Hepp): Did you ever see—just yes or no—did you ever see anything out at the Cotton Club that was any indication as to whether or not Vanada Donaby was free to leave at her own will?

A. Yes.

Mr. Hurley: Just a minute. We object to that as calling for a conclusion of the witness.

The Court: Objection overruled.

Mr. Hurley: He has a right to say what he saw but he don't have the right to testify to conclusions.

Mr. Hepp: I believe the court has ruled on it.

Mr. Hurley: I want to get my objection in.

The Court: Objection overruled.

Q. (By Mr. Hepp): Would you state—— (Interrupted.)

A. Will you repeat that one more time?

Q. Did you ever see any incident that indicated to you one way or the other whether or not Vanada Donaby was free to leave the Cotton Club?

A. Yes, sir, I did.

Q. What did you see in that regard?

A. From the way she was always watched, her and this other [55] young lady, they were never permitted to go nowhere by themselves.

Mr. Hurley: We move that the answer be stricken out, mere conclusion, no foundation laid and this other lady that he is talking about don't have anything to do with this case; just expressing an opinion.

Mr. Hepp: Your Honor, there have been lots of

(Testimony of William Jones.)

ladies introduced in this that have nothing to do with the—— (Interrupted.)

The Court: I think that is a conclusion Mr. Hepp. Objection sustained. No facts to base it on.

Q. (By Mr. Hepp): Mr. Jones, did you ever see Mr. Wright lay a hand on Vanada Donaby while you were out at the Cotton Club?

A. No, sir; I did not.

Q. State if you know whether Vanada Donaby left the Cotton Club?

Mr. Hurley: We object to that as immaterial.

The Court: Objection overruled.

Witness: State if I know if she—— (Interrupted.)

Q. (By Mr. Hepp): If she left the Cotton Club. A. We are speaking of the Club 69.

Q. Well, Club 69. [56]

A. State if I know if she ever left it?

Q. Whether she left the Cotton Club or not.

A. Well, the only time she left there, she either left with Raymond or Vern or with another man that would take them where they wanted to go or with Vernestine's cousin. Once she came to town with me as a favor. I was coming up here to buy some plumbing parts and they found out I was coming to town, so they let her come along with me. I stopped at this drug store right on the corner here and let her out and I went around the block and went to Weber & Bell's and picked up my parts and she walked down the street and met me. I had taken her back out to the Club 69.

(Testimony of William Jones.)

Q. Well, to your knowledge, did she ever leave again the Cotton Club, leave the Cotton Club?

A. The only time I know of her to leave after that is the time I picked her up when I was taking her back to the States.

Q. Why did you do that, Mr. Jones?

Mr. Hurley: We object to that as incompetent, irrelevant, immaterial.

Witness: I—— (Interrupted.)

Mr. Hurley: Just a minute.

The Court: Objection sustained.

Mr. Hurley: I don't know what his reasons were for taking her out that has anything to do with the case. [57]

Mr. Hepp: Your Honor, I am going to object to Mr. Hurley. He keeps talking long after the court has ruled on the proposition. I don't think that is proper conduct for counsel.

Mr. Hurley: I think I have a right to make my objection heard.

The Court: We will pass that up.

Q. (By Mr. Hepp): Did you know Vanada Donaby before you came to Alaska, Mr. Jones?

A. No, sir; I did not.

Q. You just met her up here?

A. I just met her up here while working there—— (Interrupted.)

Mr. Hurley: Now, we object to that your Honor, voluntary statements after the witness has answered the question.

The Court: Yes, that's sufficient.

(Testimony of William Jones.)

Q. (By Mr. Hepp): How long did you say you worked for Mr. Wright all told, Mr. Jones?

A. Oh, worked for him several weeks.

Q. Would you hold the microphone so that—
(Interrupted.)

A. I worked for him several weeks during the two jobs I did for him.

Q. Did you know Mr. Wright before you came to the Territory, [58] Mr. Jones?

A. No, sir; I did not know him but I have heard a lot about him.

Q. All good?

Mr. Hurley: We object to that.

Witness: I never heard a good thing about him.

Mr. Hurley: Just a minute, just a minute. I think the District Attorney ought to be conscious a little bit of—asking for hearsay testimony. He knows he is not entitled to ask questions like that. He, at least, knows that much.

The Court: You are making an objection?

Mr. Hurley: Yes, I objected to it.

The Court: I will sustain it.

Mr. Hepp: You may question the witness.

Cross-Examination

By Mr. Hurley:

Q. Did Mr. Wright pay you for the work that you did for him?

A. He did on one job and he didn't pay me quite all on the other.

Q. He had you arrested too, didn't he?

(Testimony of William Jones.)

A. He did, oh, yes. [59]

Q. What for?

A. Because I had taken that girl out of town.

At least I started to take her back to the States.

Q. Is that what he charged you with?

A. He charged me with—— (Interrupted.)

Q. Stealing? A. Grand larceny.

Q. Yes, stealing money out there, wasn't it?

A. Well, that's his charge.

Q. Yes. So, he didn't have you arrested for something else. He had you arrested for stealing, isn't that right?

A. Oh, no. That's what—— (Interrupted.)

Q. I say—— (Interrupted.)

A. (Continuing): ——he had me arrested——

(Interrupted.)

Q. The charge against you was stealing, wasn't it?

A. He had me arrested to bring me back here to get Vanada.

Q. I say he charged you with stealing?

A. Oh, yes, he did. I said that before.

Q. Where did you take her?

A. Where did I take her?

Q. Yes.

A. I took her in my trailer down along the river here on 2nd Street and I tried to get her to come up here and see the District Attorney before I attempted to take her to the [60] States but she feared Mr. Wright and therefore I stayed there.

(Testimony of William Jones.)

I stayed there from that Saturday morning until Sunday night about ten o'clock and she, during that time, she just cried.

Q. Just a minute. What happened on this charge that was brought against you for stealing?

A. Oh, I come back here and stayed in jail about five or six days and I obtained a lawyer and I got out.

Q. Was the case ever tried?

Mr. Hepp: I object to that, your Honor, unless it is shown it has a relation to this case, your Honor.

Mr. Hurley: It shows his feeling in the matter, your Honor.

The Court: Overruled.

Q. (By Mr. Hurley): Was the case ever tried?

A. Well, it was brought up before the court here and the contractor I worked for, he had a time book to prove that I was working out there when—— (Interrupted.)

Q. I am not asking what he proved. Was the case ever tried?

A. Well, it wasn't tried here in court but it was before the Grand Jury.

Q. That is what I asked you. It never was tried, is that right? [61]

A. It was brought before the Grand Jury.

Q. The Grand Jury? A. Yes, sir.

Q. When? A. Last week.

Q. Were you bound over to the Grand Jury?

A. I guess so.

(Testimony of William Jones.)

Q. You had a hearing before the Commissioner, did you? A. Yes, sir.

Q. And you were bound over to the Grand Jury?

A. Yes, sir; I guess so because they brought it before this, what do you call this, this petit grand jury.

Q. And you don't know whether the evidence was presented before the Grand Jury or not?

Mr. Hepp: I object to that, your Honor, unless there is a foundation to show how anyone would know what evidence was brought before the Grand Jury.

Q. (By Mr. Hurley): Did you appear before the Grand Jury?

Mr. Hepp: I object to that until he states what case he is talking about.

Mr. Hurley: Well, I have been talking about the case—— (Interrupted.)

Mr. Hepp: You identify your case then.

Mr. Hurley (Continuing): ——when he was [62] arrested for stealing and he didn't know—was he bound over on another one?

Q. (By Mr. Hurley): Did you testify as a witness in that case before the Grand Jury?

Mr. Hepp: I object to that unless counsel labels his case. There have been lots of cases before the Grand Jury.

Mr. Hurley: I mean the case against him is all.

The Court: You answer that if you can.

The Witness: No, I didn't testify.

(Testimony of William Jones.)

Q. (By Mr. Hurley): You didn't?

A. No, in the Grand Jury.

Q. I see. All—did you testify before the Commissioner?

A. I guess it was the Commissioner.

Q. I say, did you testify before the Commissioner?

A. I don't know if it was the Commissioner or who it was. I testified before someone at the other court.

Q. At the preliminary hearing? That was at the preliminary hearing that you had on this larceny charge, wasn't it? A. I guess it was.

Q. Was Mr. Wright present there?

A. No, he wasn't. [63]

Q. Do you know whether he was called before the Grand Jury or not?

A. Do I know was he called before the Grand Jury?

Q. Yeah, do you know?

A. I don't know.

Q. How much money were you accused of stealing?

A. He claimed that he had a safe stolen with \$800 in it.

Q. He claimed that you got away with \$800?

A. That's what he says.

Q. And was anybody else charged at the same time?

A. Oh, Mr. Wood, the other man that was going back to the States with Vanada and I.

(Testimony of William Jones.)

Q. The three of you?

A. Oh, yes. The girl wasn't charged, just Mr. Wood and I.

Q. Just the two of you? A. Yes, sir.

Q. I see. Did you ever see this—what's her name—this Donaby woman have intercourse with any man out there? A. Did I ever see her?

Q. Did you ever see—— (Interrupted.)

A. I seen her go in the room.

Q. Just answer the question? A. Yes.

Q. You have? You stood and watched them?

A. No, I didn't stand and watch them, but I seen—— (Interrupted.) [64]

Q. How did you see them?

A. I seen them go in the room.

Q. You saw them go in the room together?

A. Naturally. They wouldn't go in there to look at pictures or something.

Q. How do you know? Did you ever go in a room with a woman—— (Interrupted.)

A. How did I know—— (Interrupted.)

Q. (Continuing): ——to look at pictures?

A. I seen her come back out and hand out \$20 either to Vern or Mr. Wright. That's how I know.

Mr. Hurley: That's all.

Redirect Examination

By Mr. Hepp:

Q. Did you steal \$800 or any other amount?

Mr. Hurley: We object to that, if the Court please.

(Testimony of William Jones.)

Witness: No, sir.

Mr. Hurley: I move that the answer be stricken out.

The Court: Motion denied.

Q. (By Mr. Hepp): Do you know—did your Honor admit that question and answer? [65]

The Court: I let it stand, yes.

Q. (By Mr. Hepp): Tell me, Mr. Jones, do you know why—do you know how it came that you were bound over to the Grand Jury?

A. Do I know why?

Q. Do you know how that came about?

A. Well, as a rule it is regular court procedure on anyone that would commit a crime.

Q. Did you discuss this matter with your lawyer?

A. Yes, sir; I did and he had me to understand different things about it and advised me what to do.

Q. Did you do what he advised you to do?

A. Yes, sir.

Q. Was Vanada Donaby arrested when you were arrested?

A. She wasn't arrested. She just volunteered to come back with us and the Marshal also said, I think, it is best that you would go back with them. After she showed her—may I go on?

Q. Concerning your arrest, yes.

A. Well, I don't know if—just what to do. When the Marshal stopped us down at the Canadian border there, he drove up behind us in an Alaskan Highway Patrol car and called my name.

(Testimony of William Jones.)

He said, "Jones," and I said, "Yes, sir." When I turned around to him, he says, "Consider yourself under arrest. Where is Wood?" I said, "He is in the trailer getting his social security card for identification." I said, "Under [66] arrest? For what?" He says, "For grand larceny." I says, "What do you mean?"—— (Interrupted.)

Mr. Hurley: I object—just a minute. I object to all this conversation.

The Court: Sustain the objection.

Mr. Hepp: Your Honor, I believe I have a right to go into something that counsel raised.

The Court: This is too far afield.

Mr. Hepp: Too far afield?

Q. (By Mr. Hepp): You didn't take the \$800?

A. Pardon?

Mr. Hurley: I object to that. He has already testified that he didn't.

The Court: I didn't hear the—what is your—that question?

Mr. Hurley: He wanted to know if he got away with the eight hundred.

Mr. Hepp: I think that is paraphrased, your Honor.

Witness: No—— (Interrupted.)

The Court: Just a minute.

Witness: Pardon me?

The Court: Never mind. [67]

Q. (By Mr. Hepp): Were you indicted for that crime, Mr. Jones?

(Testimony of William Jones.)

A. Can we talk on that \$800 subject one more time?

Q. I don't think it is relevant at all.

A. I hate to sit up here and be looked at as a fool when I didn't take no \$800.

Mr. Hurley: I object, if the Court please.

Witness: Had I taken the \$800—— (Interrupted.)

Mr. Hurley: I object, if the Court please.

Witness (Continuing): ——when the Marshal searched my trousers and everything in my—— (Interrupted.)

Mr. Hurley: I object as not responsive to the question. I move that the answer be stricken out.

The Court: May be stricken.

Q. (By Mr. Hepp): Were you indicted, Mr. Jones?

A. No, sir; I wasn't indicted.

Mr. Hepp: I have no further question. I have one other question to ask, your Honor. May I ask it?

The Court: Very well.

Q. (By Mr. Hepp): Mr. Jones, have you ever been convicted of a crime?

A. No, sir; I haven't. [68]

The Court: Anything further with this witness?

Mr. Hepp: I just asked a question, Mr. Hurley.

Mr. Hurley: No, nothing further, your Honor.

The Court: That's all, Mr. Jones.

(Mr. William Jones stepped off the witness stand.)

Mr. Hepp: Your Honor, I don't believe there is enough time left today to get started on another witness and there is an argument coming on at five o'clock.

The Court: Yes, very well. We will continue the case until ten o'clock tomorrow morning upon adjournment.

Mr. Hurley: Tomorrow morning, your Honor?

The Court: No, that's right. That will be Monday. Monday at ten upon adjournment.

(At this time, the court duly admonished the jury and the trial of this cause was adjourned until 10 o'clock a.m., Monday, November 6, 1950.)

Be It Remembered, that upon the 6th day of November, 1950, at 10 o'clock a.m., came the [69] respective counsels as heretofore; came the defendants in person and the trial jurors in this cause; the Honorable Harry E. Pratt, District Judge, presiding.

Clerk of the Court: Court is now in session.

The Court: Any ex parte matters? Call the roll of the jury.

(The trial jurors in this cause all answered to his or her name.)

Clerk of the Court: They're all present, your Honor.

The Court: Counsel ready to proceed with the trial of 1507 criminal?

Mr. Hepp: Ready.

Mr. Hurley: Ready, your Honor.

The Court: Very well, call your witness.

Mr. Hepp: Will you call Nathaniel Wood, please?

Mr. Hurley: What is the name?

Mr. Hepp: Nathaniel Wood.

NATHANIEL WOOD,

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination [70]

By Mr. Hepp:

Q. Would you state your name to the jury, please? A. Nathaniel Wood.

Q. Where do you live, Mr. Wood?

A. L. A.

Mr. Hurley: What was that?

Witness: In Los Angeles.

Q. (By Mr. Hepp): How old are you, Mr. Wood? A. Thirty.

Q. What is the nature of the work you do for a living, Mr. Wood? A. Mechanic, right now.

Q. Have you ever lived in Fairbanks?

A. Yes, sir.

Q. During what period of time did you live in Fairbanks?

A. In June. I come in on Memorial Day.

Q. On Memorial Day? A. That's right.

Q. Is that of this year? A. This year.

Q. How long did you stay in Fairbanks?

(Testimony of Nathaniel Wood.)

A. I stayed in Fairbanks until we left in July—in July.

Q. Where did you live while you were in Fairbanks?

A. Well, at the Wright's place. That is the last place I [71] lived, right—— (Interrupted)

Q. Which Wright?

A. Raymond Wright.

Q. Is that the defendant here?

A. That's right.

Q. Where was this place?

A. Out on Cushman; on Cushman at the 69 Club.

Q. How long did you live out there, Mr. Wood?

A. Over three weeks and a half.

Q. Do you know a person named Vanada Donaby?

A. I know a girl like that, sure.

Q. Did you see her out there while you were living out there, Mr. Wood?

A. I seen her out there while I was out there.

Q. What was she doing there?

A. Well, she was supposed to be a prostitute out there.

Q. Did you ever hear either Raymond—do you know Vernestine Wright?

A. I know her.

Q. Where does she live?

A. She lives out there.

Q. Out at this Club 69?

A. Club 69.

Q. Did you ever hear either Raymond Wright or Vernestine Wright ever say anything to Vanada or to you concerning [72] Vanada's presence out there at the Cotton Club—I mean Club 69?

(Testimony of Nathaniel Wood.)

A. Sure, I have heard him say things. "Whore, get up there and make me some money."

Q. Ever hear anything else?

A. Sure, I've heard him. I saw him drag her out of bed by her feet, over her face.

Q. Would you repeat your statement that we didn't quite catch, something about dragging somebody?

A. Drag her by her foot and dragged her out of bed on her face and say, "Get up——" (Interrupted)

Q. Who was dragged out of bed?

A. Raymond Wright dragged her out of the bed on her face.

Q. Dragged who out?

A. Vanada Donaby.

Q. Vanada Donaby? A. That's right.

Q. Did you ever hear anything else?

A. He said she would never leave there.

Q. Who said that? A. Ray Wright.

Q. He said that she would—— (Interrupted)

A. She would never leave there.

Q. And he was talking to who then?

A. Vanada Donaby. [73]

Q. What were you doing while you were out at the Club?

A. I was working around the club and around the new place he was building around the Cotton Club.

Q. What was the nature of your work that you were doing, Mr. Wood?

(Testimony of Nathaniel Wood.)

A. Helping the carpenter around.

Q. Did you know Raymond Wright before you came to Alaska?

A. Yeah. I know him before I came to Alaska.

Q. Did you ever hear either Raymond Wright or Vernestine Wright make any threatening remarks to Vanada?

A. I heard Raymond Wright make threatening remarks to her.

Q. What did you hear him say?

A. He told her that he would kill her and nobody would know if she tried to leave there.

Q. If she tried to leave there?

A. If she tried to leave there.

Q. Did you ever hear anything else?

A. I heard lots of things. I told him I wouldn't treat a dog like that, like he treated the girls.

Q. What did he say to that. Just raise your voice now and what was your last answer, about after you told him that you wouldn't treat a dog like he treated the girls?

A. He said he cared more for his dog than he did for the girls.

Q. He cared more for his dog than he did for the girls? While you were out at the Club 69, how many girls were there, [74] Mr. Wood?

A. Living there was two; living there.

Q. Were there any others that came there regularly? A. That's right; two more.

(Testimony of Nathaniel Wood.)

Q. Two more? Did the other two work out there in any capacity?

A. Sure, they worked out there.

Q. What were they doing?

Mr. Hurley: We object to that unless he knows and he is qualified—incompetent, irrelevant and immaterial—calling for a conclusion.

Mr. Hepp: I will rephrase the question.

Q. (By Mr. Hepp): Do you know what they were doing out there?

A. Sure, I know what they was doing out there. I saw them with my own eyes what they were doing.

Q. What were they doing?

A. They was prostitutes out there.

Q. Prostitutes?

A. Yes. They was out there in the room. I saw them with my own eyes in the room with soldiers.

Q. Did you see money exchanged?

A. Money exchanged.

Q. To whom—who would get the money?

A. Vernestine Wright, Ray Wright's wife, would get the [75] money, receive the money.

Q. Do you know of your own knowledge whether Vanada ever moved away from the Club 69?

A. Repeat that again?

Q. Do you know of your own knowledge whether Vanada ever moved away from the Club 69?

A. No, I don't. I don't know that.

Q. Is she still there?

A. She went away because I had taken her away. At least, I helped to take her away.

(Testimony of Nathaniel Wood.)

Q. Under what circumstances was that?

Mr. Hurley: We object to that, incompetent, irrelevant and material, calling for a conclusion.

Mr. Hepp: Well, I don't think that under what circumstances calls for any conclusions, your Honor. He can state facts as he knows them.

The Court: Objection overruled.

Q. (By Mr. Hepp): Would you answer the question, please?

A. I had taken her away. I left on a Friday and she—I had left on a Friday and she left on a Saturday.

Q. Under what circumstances did you leave?

A. Well, the action I seen him make there, I know it was time to try to get away. She cried the whole time I was there to get away from there. That is when I got away from [76] there.

Q. And that is when you got away or got her away? A. I got away from there.

Q. And did you—— (Interrupted)

A. She left on a Saturday.

Q. Did you know Vanada before you came to Fairbanks?

A. No, I didn't. I didn't know her.

Q. Are you married, Mr. Wood?

A. Is I married?

Q. Yes? A. Sure.

Q. Family?

A. Family. My daughter is 17 years old. She is married.

(Testimony of Nathaniel Wood.)

Q. I didn't quite understand you. How old was your daughter? A. Seventeen?

Q. And how old are you, Mr. Wood?

A. Thirty. Her next birthday she will be 17.

Q. Her next birthday she will be 17? Are you employed now, Mr. Wood? A. Yes, sir.

Q. Where are you employed?

A. In Los Angeles—17th Street and Olive.

Q. Were you subpoenaed to come back here?

A. Yes, sir; I was. [77]

Mr. Hepp: You may question the witness.

Cross-Examination

By Mr. Hurley:

Q. Mr. Wood, you say you left out there on Friday, the 6th, is that right?

A. I couldn't recall the date, the time. I left on a Friday.

Q. On a Friday? And you say Vanada—Vanada Donaby left on a Saturday?

A. On a Saturday.

Q. On a Saturday? How did you take her away Saturday when you left on Friday.

A. I didn't leave town. I left out to his house—his club.

Q. Then she left herself?

A. Fellow that worked out there brought her to town.

Q. What?

A. A fellow that worked out there for him brought her to town.

(Testimony of Nathaniel Wood.)

Q. So, you didn't have anything to do with taking her away from there?

A. No, not there.

Q. And then where did you go with her—when did you leave town? [78]

A. Sunday.

Q. Sunday? And how did you leave?

A. Left in a truck and trailer.

Q. What? A. Truck and trailer.

Q. And you left in the truck and trailer?

A. All three of us.

Q. Who?

A. Bill Jones and myself and Vanada.

Q. I see. And where did you go when you left town on Sunday? Where did you go?

A. Oh, we left town.

Q. I say, where did you go when—on Sunday when you left town?

A. Gone back to the States.

Q. What?

A. We was going back to the States.

Q. And how far did you get?

A. To the border.

Q. And what happened?

A. The Marshal picked us up; stopped us and brought us back.

Q. What for? A. Say, "Grand larceny."

Q. And did you find out what you were accused of? [79]

A. Sure I found out what I was accused of.

Q. What were you accused of?

A. Accused of taking his money.

(Testimony of Nathaniel Wood.)

Q. What money?

A. Ray Wright's money.

Q. How much?

A. I don't know what it was. Two thousand dollars, I heard. The cop told me two thousand dollars. That's all I know about it.

Q. And you were brought back then to Fairbanks? A. Brought back in to Fairbanks.

Q. Were you brought into court?

A. Brought into court, sure.

Q. And when you finally left here, how did you leave?

A. The Highway Patrol taking us back to our trailer.

Q. What?

A. Highway Patrol taking us back to our trailer.

Q. And did this Miss Donaby—was she brought back too? A. Sure, she come back.

Q. Did you know a girl by the name of Willa May Walters? A. Willa May Walker?

Q. Walters?

A. I know Willa May but her last name, I don't know. All I know is Willa May. [80]

Q. Was she supposed to leave with you too?

A. Yes, she was supposed to leave too.

Q. And then you said I think there was two other girls out there. Who were they?

A. Opal. One was Opal.

Q. Opal what?

A. I don't recall her last name.

Q. And who was the other one?

(Testimony of Nathaniel Wood.)

A. We called her Shorty. She was a little, low girl.

Q. What? A. Shorty.

Q. Don't you know what her name was?

A. No, I don't.

Q. Did you tell the officers about these girls—two girls being out there?

A. Sure I told them.

Q. What? A. Sure I told them.

Q. Do you know what this money was supposed to be in?

A. I don't know what it was supposed to be in at all.

Q. Did you see the little safe out there that weighed about forty pounds that they had kept money in?

A. I never saw his safe. I never went around his money.

Q. Never saw it? A. Never saw it. [81]

Q. Never saw where they put money?

A. Never saw.

Q. No? Do you know whether Jones saw the—saw it or not? A. I—— (Interrupted)

Mr. Hepp: I object to that, your Honor, unless there is a showing that this witness knows what Jones did—— (Interrupted.)

Mr. Hurley: I asked him whether Jones saw it or not.

Mr. Hepp: I object to the question unless there is a foundation laid.

(Testimony of Nathaniel Wood.)

Mr. Hurley: He can answer the question yes or no.

Mr. Hepp: Just let the court rule on the objection, Mr. Hurley.

The Court: Objection sustained.

Q. (By Mr. Hurley): Do you know whether Vanada Donaby saw it or not?

Mr. Hepp: I object to that, your Honor, unless there is a foundation showing that this person knows what Vanada Donaby saw. He is calling for just a mere conclusion.

The Court: Objection sustained.

Mr. Hurley: That's all.

Mr. Hepp: Just one moment. [82]

Redirect Examination

By Mr. Hepp:

Q. I think, Mr. Woods, that you answered something in answer—in response to counsel's question about Vanada Donaby being brought back from the border. Under what circumstances did she come back from down on the border?

A. She come back to let them know that we didn't take her away.

Mr. Hurley: Now, just a minute—— (Interrupted)

Q. (By Mr. Hepp): Was she arrested?

A. No, she wasn't.

Mr. Hurley: I move that that answer be stricken as not responsive, incompetent, irrelevant and immaterial; no proper foundation laid for it.

(Testimony of Nathaniel Wood.)

The Court: Motion denied.

Q. (By Mr. Hepp): Was she under arrest?

A. No, sir; she wasn't under arrest.

Q. I wasn't—I didn't quite understand your answer to a question as to the Highway Patrol. What did you say in response to counsel's question about the Highway Patrol taking you someplace?

A. The Highway Patrol escorted us back. [83]

Q. Excluded or escorted?

A. I mean, escorted us back.

Q. Escorted? Back where?

A. Back to our truck.

Q. Where was it?

A. Down at the border, Canadian border.

Q. Mr. Wood, were you indicted for the crime of grand larceny?

A. Sure. I was indicted and brought back.

Q. No. Were you indicted by the Grand Jury for the crime of grand larceny?

A. I don't think so. (Pause.) Sure, I was indicted.

Q. Do you know what an indictment is, Mr. Wood? A. No, I don't understand.

Q. Have you been placed under arrest in the last month, Mr. Wood? A. Sure.

Q. When were you placed under arrest?

A. They arrested me when they brought me back.

Q. In the last month, Mr. Wood, have you been placed under arrest?

A. I don't know whether I have or not.

Q. Has a Marshal ever placed you under arrest?

(Testimony of Nathaniel Wood.)

A. Sure, the Marshal placed me under arrest when they brought me back. [84]

Q. When was that?

A. Just from the border.

Q. From the border? A. Sure.

Q. Have you ever been under arrest since then?

Mr. Hurley: We object to that, if the Court please.

Mr. Hepp: Well, I think that I have a right——
(interrupted)

Mr. Hurley: Incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Q. (By Mr. Hepp): Have you been placed under arrest since that time, Mr. Wood?

A. No, I haven't.

Q. Has anybody ever informed you that a Grand Jury had indicted you?

Mr. Hurley: We object to that, if the Court please—— (interrupted)

Mr. Hepp: Well—— (interrupted)

Mr. Hurley (Continuing): ——incompetent, irrelevant and immaterial. He says he has never been indicted and—— (interrupted)

Mr. Hepp: He says he had been, your [85] Honor and I am not too sure that this witness knows the difference between an indictment and a complaint.

The Court: Objection overruled.

Q. (By Mr. Hepp): Would you answer the

(Testimony of Nathaniel Wood.)

question? Has anybody informed you that the Grand Jury indicted you?

A. No, they haven't. That I know.

Mr. Hepp: That's all.

Mr. Hurley: No further questions.

Mr. Hepp: I believe that's all then. Thank you very much.

(At this time, the witness, Mr. Nathaniel Wood, left the stand and the courtroom.)

Mr. Hepp: Your Honor, I would normally rest the Government's case at this time, but however, before I do so, I believe that—I believe that, your Honor, that the evidence here has not been sufficiently pertinent as pertaining to the one defendant, Vernestine Wright to show a prima facie case and it does not seem to tie her into this matter to the extent sufficient, I believe, under our rules. I will move the Court to dismiss this indictment as against Vernestine Wright for the reason that there has not been a prima facie case shown to link her with the charge.

The Court: Very well, motion granted. The action is dismissed as to Vernestine Wright and Mr. Clerk, [86] you will please strike out of the title of this case "and Vernestine Wright" and strike the "s" off of "defendants" down in the body of the indictment. Strike out the words "and Vernestine Wright."

Mr. Hepp: I will rest the government's case, your Honor.

The Court: Very well. (To Mr. Hurley.) Call your first witness.

Mr. Hurley: If the Court please, I would like to make a motion outside of the presence of the jury.

The Court: Very well. The jury will be excluded from the courtroom until called. Just remain in the hallway subject to call.

(At this time, the jury retired from the courtroom and the following proceedings were had outside of the presence of the jury.)

Mr. Hurley: If the Court please, at this time, on the—on behalf of the defendant, Raymond Wright, we wish to interpose a motion that the jury be instructed to return a verdict of not guilty and judgment of acquittal be entered. I make this motion—I haven't had time to go into the authorities as much as I should. I don't care to make an argument on the point, but I make it to protect the rights of the defendant.

Mr. Hepp: Your Honor, I don't know [87] how I can answer if there has been no argument. All I can say is that I oppose the motion.

The Court: All right, the motion is denied.

Mr. Hurley: Can we have about a fifteen minute recess or a ten minute recess?

The Court: Yes.

Mr. Hurley: The jury is already out.

The Court: We will take a ten minute recess.

(At this time, a ten minute recess was taken. Upon reconvening, the following proceedings were had.)

The Court: Call the roll of the jury.

(The Clerk of the Court called the roll of the jury, each juror answering to his or her name.)

Clerk of Court: They're all present, your Honor.

The Court: Counsel ready to proceed with the trial of this case?

Mr. Hepp: Ready, your Honor. At this moment, I would like to come forward and have a word with the court out of the hearing of the jury.

The Court: Very well.

(The following proceedings were had out of the presence and hearing of the jury.)

Mr. Hepp: Your Honor, at this time, I [88] would like to ask the court to allow me to reopen the government's case to ask this last witness the single question of what year he was born.

Mr. Hurley: I object to the reopening of the case. He has already testified to his age and I don't see—— (Interrupted.)

Mr. Hepp: Your Honor—— (Interrupted.)

Mr. Hurley: I don't see that asking the year he was born would be of any help and I don't think they have a right to reopen it. The man knows how old he is.

The Court: I will grant the motion, Mr. Hurley.

Mr. Hurley: Save an exception. Just a minute. Mr. Benton took the exhibit away with him. It was marked for identification—— (Interrupted.)

The Court: No, it wasn't.

Mr. Hurley: Yes. Dixie said it was marked as identification "A" and he forgot to bring it up and he sent for it and he said it will be here shortly. I don't know if he is trying to get somebody to get it. I hate to proceed without him but—I don't mind about this part of the case. I don't mind about the re-opening part of it but I would like to put that in first as proof. I think it will be here in time, but if it isn't, I would like to wait.

The Court: Well, bring it up when it [89] comes.

Mr. Hurley: Yes, I will.

(The following proceedings were had in the presence and hearing of the jury.)

Mr. Hepp: Call Nathaniel Wood, please.

The Court: Motion of the plaintiff's case permitted to be re-opened.

NATHANIEL WOOD

called as a witness in behalf of the Plaintiff, having been previously sworn, resumed the witness stand and testified as follows:

Redirect Examination

By Mr. Hepp:

Q. Mr. Wood, what year were you born in?

A. 1916. I made a mistake.

Q. You were born in 1916? A. 1916.

Mr. Hepp: That's all.

(Testimony of Nathaniel Wood.)

Recross-Examination

By Mr. Hurley:

Q. And why did you say you were 30 years old?

A. Well, I just got a little excited.

Q. A little excited? Forgot how old you were, is that right?

A. That's right. [90]

Mr. Hurley: That's all.

(The witness proceeded to leave the witness stand and was interrupted as follows:)

Q. (By Mr. Hurley): Oh, just one more question.

A. Pardon me?

Q. What day were you born on?

A. On the 3rd of October.

Mr. Hurley: That's all.

(Mr. Nathaniel Wood at this time left the witness stand and the courtroom.)

Mr. Hepp: I will rest the Government's case.

The Court: Very well.

Mr. Hurley: Now, if the Court please, there was a mistake made here yesterday. We introduced—that is, we had an exhibit marked and inadvertently it was taken away. It should have been left with the Clerk of the Court and we have sent for it. I would like to put that evidence on first. I think it will be here in just a few minutes. I would like to put that in first if I can and Mr. Benton is out trying to get it now and I hate to proceed without him being here.

The Court: Well, we will take a ten [91] minute recess. He will be here by that time, won't he, Mr. Hurley?

Mr. Hurley: I hope so, your Honor. He seemed to think he could get it in that length of time.

The Court: Very well.

Clerk of the Court: Court is recessed for ten minutes.

(At this time, a ten minute recess was taken.)

Clerk of the Court: Court is reconvened.

The Court: Call the roll of the jury.

(The Clerk of the Court called the roll of the jury, each juror answering to his or her name.)

Clerk of the Court: They are all present, your Honor.

The Court: Counsel ready to proceed?

Mr. Hurley: We are ready, your Honor.

Mr. Hepp: Ready, your Honor.

The Court: Very well.

Mr. Hurley: We will call Jack Glass.

JACK GLASS

having been called as a witness in behalf of the defendant, being first duly sworn, testified as [92] follows:

Direct Examination

By Mr. Hurley:

Q. What is your name? A. Jack Glass.

Q. Where do you live, Mr. Glass?

A. 523-4th.

(Testimony of Jack Glass.)

Clerk of the Court: That's not loud enough.

Q. (By Mr. Hurley): You say where?

A. 523-4th.

Q. Here in Fairbanks? A. Yes, sir.

Q. How long have you lived there?

A. I have lived there about nine months.

Q. And what business are you engaged in?

A. Rooming house.

Q. What is the name of the rooming house that you operate, Mr. Glass?

A. The Clark Rooms.

Q. Were you operating the Clark Rooms in February of this year? A. Yes, sir.

Q. And are you still operating them?

A. I am. [93]

Q. Are you acquainted with a woman by the name of Donaby, Vanada Donaby?

A. She was a roomer at my house.

Q. I call your attention to defendant's identification "A" and ask you to look at it and state what it is if you know. What is this book?

A. This is our hotel register book.

Q. Your hotel register book? A. Yes, sir.

Q. I see. And did this Miss Donaby register there at your hotel?

A. This is the name she signed.

Q. Is that the register that she signed on when she went to stay here? A. That is the one.

Q. And point out where her name is?

A. Right here. (Pointing.)

(Testimony of Jack Glass.)

Q. That is the second name from the bottom on the first page, is it not? A. That's right.

Mr. Hurley: We will offer this in evidence, your Honor.

Mr. Hepp: No objection.

The Court: May be admitted.

Clerk of the Court: Defendant's exhibit [94] number one.

(At this time, a hotel register book for the Clark Rooms, Fairbanks, Alaska, having been previously received and marked Defendant's Identification "A," was received in evidence and marked Defendant's Exhibit 1.)

HOTEL REGISTER

93

The Proprietor is not responsible for the loss of MONEY, JEWELS, or other Valuables, unless deposited in the Safe provided for that purpose.

DATE February 10 - 1950. - 523-4H.

NAME	RESIDENCE	Room	Time of Arrival	Time of Departure
Mr. & Mrs. Thomas	Richmond Calif.	I	2/14/50	
Mr. E. Johnson	Oakland Calif.	6	2-28/50	
Mr. & Mrs. T. Wilson	Fribanks	2	2-20-50	
Alb. L. Rodine		6	2-28-50	
Sam. Little	Ident. A	3	3-4-50	
Bill. Johnson	Exhibit I	3	3-5-50	
	Plaintiff	3	3-5-50	
Mr. & Mrs. Wright	Defendant	6	3-8-50	
70 Little	No. 1507-U	3	3-8-50	
Mr. & Mrs. Fribanks		4	3/1/50	
Mr. & Mrs. Little		3	3/8/50	
Mr. & Mrs. Little		③	3/13/50	
James Session	Anchorage Alaska	3-2	3/18/50	
B. J. Seal	Seattle Wash.	I	3/19/50	
Mr. & Mrs. J. Porter	Copper Center	I	3/18/50	
Mr. & Mrs. James Brown		I	3/19/50	
Leroy James		3	3/24/50	
Mr. & Mrs. B. B. Smith	Seattle Wash.		3/21/50	
Louis Shapiro	N. Y. C.		3/21/50	
Eugene L. May			3/24/50	
Mr. & Mrs. Donald	Seattle		3/6/50	
Mr. & Mrs. Donald				

(Testimony of Jack Glass.)

Q. (By Mr. Hurley): I notice it says "Mr. and Mrs. Donaby." Did she say anything about that when she registered?

Mr. Hepp: I object to this unless counsel can show what relation it has to this trial. I don't particularly care whether he goes in to this one way or the other, except it is time consuming and I think he should show its relation to this trial.

The Court: Was that shown to the witness when she was on the stand?

Mr. Hepp: Yes.

Mr. Hurley: She said she signed it.

The Court: All right, objection overruled.

Mr. Hurley: Just read that last question.

(The last question was read to the witness by the reporter as follows: "Q. I notice it says, 'Mr. and Mrs. Donaby.' Did she say anything about that when she registered?")

The Witness: No, she didn't. [95]

Q. (By Mr. Hurley): How long did she stay there? A. For a month, one month.

Q. Did you ever see a Mr. Donaby there at your rooming house, Mr. Glass?

A. No, not while she lived there.

Q. Do you know Mr. Donaby?

A. No, I don't.

Q. Did you ever ask her why she registered as Mr. and Mrs. Donaby?

Mr. Hepp: I object to that. This witness stated that she had not said anything concerning that.

The Court: Objection overruled.

(Testimony of Jack Glass.)

Q. (By Mr. Hurley): Did she ever ask you—
did you ever ask her why she registered as Mr. and
Mrs. Donaby?

A. No, I never asked her why.

Mr. Hurley: That's all.

Mr. Hepp: No questions.

(Mr. Jack Glass left the witness stand.)

Mr. Hurley: I call Dora Woods.

DORA WOODS

called as a witness in behalf of the Defendant, being
first duly sworn, testified as follows:

Direct Examination

By Mr. Hurley: [96]

Q. Speak up loud so we can all hear you. What
is your name, please? A. Dora Woods.

Q. And where do you live?

A. I live at 26th and Mercer.

Q. Here in Fairbanks? A. Yes.

Q. How long have you lived here?

A. About six months.

Q. Are you acquainted with Vanada Donaby?

A. I am.

Q. And where did you first know her?

A. At Hanford, Washington, in 1945.

Q. What was she doing there at Hanford, Wash-
ington, when you knew her?

A. Well, she was working as a bus girl in a
restaurant there.

(Testimony of Dora Woods.)

Q. And what were you doing?

A. I was a bus girl in the restaurant too.

Q. Was she doing anything else there?

A. Yes, it was with me in the men's barracks.

Q. Yes, and what was she doing?

Mr. Hepp: I object to that unless the foundation is laid to show that this witness knows of her own knowledge what was done. [97]

Mr. Hurley: She says she was working with her in the men's barracks.

The Court: Is that what she said?

Mr. Hepp: I think the foundation should be laid as to what she saw or something like that.

The Court: Objection overruled.

Q. (By Mr. Hurley): What was she doing?

A. Well, she was making money off of those men the same as I was.

Q. How? A. Sleeping with them.

Q. Having sexual intercourse with them?

A. Yes.

Q. How long did that carry on there in Hanford?

A. Well, I stayed out there four months. I don't know when she terminated. I terminated in four months' time.

Q. You went with her, did you, at times to the barracks?

A. Yes, we would go down after we finished working at night.

Q. Would you and she both sleep with men there? A. Yes.

(Testimony of Dora Woods.)

Mr. Hurley: That's all, you may cross-examine.

Mr. Hepp: Just a minute, please. [98]

Cross-Examination

By Mr. Hepp:

Q. Have you worked for Cleo while you were in Fairbanks? A. No.

Q. You haven't? A. No.

Q. How long have you known Raymond Wright, the defendant?

A. I guess about eight or nine years.

Q. A long time? A. Yes.

Q. What year did you say this was supposed to have taken place? A. 1945.

Q. How old are you? A. Me? I am 39.

Q. Thirty-nine? A. Yes.

Q. Married? A. I have been married.

Q. Divorced?

A. No. My husband is deceased.

Q. When were you married?

A. When was I married? In 1940.

Q. Any children? A. No. [99]

Q. What was the name of this—that tavern you worked at? Did you say?

A. In a tavern? I never worked in no tavern. I worked in the mess hall, number one, personnel, Hanford, Washington, Olympia Commissary.

Q. Would you state that all over again so I can write it down please, slower?

A. Number One, personnel, which is the mess

(Testimony of Dora Woods.)

hall, for Olympia Commissary. They had charge of all the mess halls for DuPont.

Q. You were there four months, you say?

A. Yes.

Q. Make a lot of money there, did you?

A. I made my part.

Q. What kind of people did you entertain, white people or colored people?

A. All nationalities.

Q. Is that your present business?

A. No.

Q. What are you doing here?

A. Anything I can get, day's work, anything.

Q. By whom were you employed last?

A. I haven't had any work here, but I am a tax payer and I own property in Ketchikan, Alaska.

Q. And how long did you say you have been here? [100] A. Six months.

Q. And you haven't worked for anybody?

A. No.

Q. Ever been convicted of a crime?

A. No, I haven't.

Mr. Hepp: That's all.

Mr. Hurley: That's all.

(Dora Woods left the witness stand.)

Mr. Hurley: Call Anzol Simon.

ANZOL SIMON

called as a witness in behalf of the Defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Hurley:

Q. Speak up loud. What is your name?

A. Anzol Simon.

Q. Where do you live?

A. 523-4th Avenue.

Q. Here in Fairbanks? A. Yes.

Q. How long have you lived here?

A. Oh, well, about 18 months.

Q. Who owns that house you live in?

A. Jack Glass. I mean he has it rented. [101]

Q. What?

A. I rent from Jack Glass. I don't know who owns it.

Q. Did you know a woman by the name of Eleanor Jones? A. Yes, I do.

Q. How long have you known her?

A. Since I came here, 18 months.

Q. And do you know what business she was engaged in here in Fairbanks? A. Yes.

Q. What?

A. She had the Triple X up here.

Q. What kind of a place was that?

A. It was a barbecue place.

Q. And she ran the place, did she?

A. Yes.

Q. Did you work there?

(Testimony of Anzol Simon.)

A. Yes, I worked as a cook.

Q. You worked for her as a cook?

A. Yes, sir.

Q. Was she doing anything else besides just running the place as an eating place, if you know?

Mr. Hepp: Just a minute. I am going to object to that unless there is a foundation laid that this witness here knows.

The Court: Objection sustained. [102]

Mr. Hurley: Well I asked him if he knows.

Q. (By Mr. Hurley): Do you know whether or not she was doing anything else there besides running this place as an eating place?

Mr. Hepp (to the witness): Just yes or no.

Witness: Yes.

Q. (By Mr. Hurley): What was she doing there besides running an eating place?

A. Well, she was a prostitute.

Q. Was she practicing it there?

A. Well, not exactly there, but at her home.

Q. And where was her home?

A. 650 4th Avenue.

Q. Now, did you know Vanada Donaby?

A. Yes, I did.

Q. Was she working out there for Eleanor Jones? A. Yes, she was.

Q. While you were there? A. Yes.

Q. What was she doing?

A. Well, she was—she worked as a waitress.

Mr. Hurley: That's all, you may cross-examine.

Mr. Hepp: Just a moment please. I have [103] a few questions.

(Testimony of Anzol Simon.)

Cross-Examination

By Mr. Hepp:

Q. How long did you say you had been here in Fairbanks, Mr. Simon?

A. About 18 months. (Pause.) To be correct, I came here——(Interrupted.)

Q. Pardon?

A. To be correct, I came here in June, 1949.

Q. Mr. Simon, have you ever been in a penitentiary? A. Oh, no.

Q. Have you ever been convicted of a penitentiary sentence, Mr. Simon? A. No.

Q. Ever been convicted of a crime?

A. Yes.

Q. And you say your name is Anzol Simon?

A. That's right.

Q. Ever been around Los Angeles?

A. Yes, I have.

Q. 1943? A. Since '37, '36.

Q. Were you there in 1943?

A. Yes, I were.

Q. And you say you never have been convicted of a penitentiary [104] sentence?

A. What is a penitentiary sentence may I ask?

Q. Oh, something like robbery?

A. Well, yes.

Q. Then you have been?

A. Is that a penitentiary sentence?

Q. Well, I am asking you. I believe it is.

A. Well, I have been convicted.

Q. That wasn't——(Interrupted.)

(Testimony of Anzol Simon.)

Mr. Hurley: I object to this, if the Court please, of going into details. He has already asked the question. The statute gives him the permission to ask and he has answered it.

Mr. Hepp: This is not a defendant, your Honor. This is a witness.

Mr. Hurley: Doesn't make any difference who it is.

The Court: Objection overruled.

Q. (By Mr. Hepp): That's not the conviction though that you were—was it the one that you said you had been convicted of a crime?

A. Well, no. I was thinking of here in Alaska.

Mr. Hepp: That's all.

Mr. Hurley: That's all.

(Mr. Anzol Simon was excused and left [105]
the witness stand.)

Mr. Hurley: I call Willa May Walters.

WILLA MAY WALTERS

called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Hurley:

Q. What is your name?

A. Willa May Walters.

Q. Speak up loud, so that they can hear you.

The Court: Give her the loud speaker.

(The Clerk of the Court handed the witness the loud speaker.)

(Testimony of Willa May Walters.)

Q. (By Mr. Hurley): How old are you?

A. 26.

Q. And where do you live now?

A. At 23rd and Mercer.

Q. Here in Fairbanks?

A. That's right.

Q. How long have you lived here?

A. Last January the 7th.

Q. Are you acquainted with the defendant, Raymond Wright? A. I am. [106]

Q. And you know his wife, Mrs. Wright?

A. I do.

Q. Do you know Vanada Donaby?

A. Yes.

Q. How long have you known her?

A. Since last May I believe.

Q. And where did you meet her?

A. At the Cotton Club.

Q. What were you doing there?

A. Well, I was working for Mrs. Wright.

Q. And did you know a man by the name of William Jones, a plumber, that testified here yesterday? A. Yes, I did.

Q. Did you know a man by the name of Nathaniel Woods? A. I did.

Q. How long have you known those men?

A. I have known William Jones since '44 in California.

Q. And how long have you known Nathaniel Woods?

(Testimony of Willa May Walters.)

A. I just met him the last few months. I can't recall just when.

Q. What were these men doing when you saw them here in Fairbanks?

A. They were putting in some plumbing for Mr. Wright.

Q. Did you ever have any conversation with these two men and—this William Jones and Nathaniel Woods and Vanada [107] Donaby in regard to taking money out from Mr. Wright's place?

Mr. Hepp: Just a minute, don't answer. I object to that, your Honor. Counsel is trying to bring in these red herrings. Unless he can show the relation to the issues before this court, I don't think that they are pertinent or relevant and I object to their being gone into.

Mr. Hurley: If the Court please, I want to show that—why, I think this is important to show their feeling of the witness Vanada Donaby and Jones and Woods.

The Court: No foundation laid for that at all. Objection sustained.

Q. (By Mr. Hurley): Well, I will ask you this question. Did these people, these three people, Vanada Donaby, William Jones and Nathaniel Wood ever talk to you about stealing the—(Interrupted.)

A. They did.

Mr. Hepp: Just a minute, I object, your Honor—(Interrupted.)

Q. (By Mr. Hurley): What was that?

Mr. Hepp: Don't answer that.

(Testimony of Willa May Walters.)

Q. (By Mr. Hurley): Did they talk to you about stealing a safe or a little strong box in which the defendant, Raymond Wright, kept his [108] money?

Mr. Hepp: Just a minute. Don't answer that. I object to that for the same ground as the other one. There is no foundation laid and it is prejudicial.

The Court: Objection sustained.

Mr. Hepp: And I believe that witness did make some remark in response to counsel's question and if she did, I desire to have it stricken from this record.

The Court: May be stricken.

Mr. Hurley: I would like to make an offer of proof, your Honor.

(The following proceedings were had out of the presence and hearing of the jury:)

Mr. Hurley: I offer to prove by this witness that she and Vanada Donaby and William Jones and Nathaniel Woods planned to steal this safe or strong box from the defendant, Ray Wright, and that Vanada Donaby heard their conversation, your Honor, to take it and that she was supposed to leave with them when they left Fairbanks, but that she decided not to go into the larceny of the box and money and did not leave from Fairbanks.

Mr. Hepp: Now, I object to that. It has no relation to this trial. The charge in the Grand Jury went into that matter. It has no relation to this

(Testimony of Willa May Walters.)

case at all, your Honor, and I don't feel that it goes to prove any issues here or as far as I am concerned, is a proper [109] impeachment of any witness. It has never been proven or any showing been made. I can go into this matter and show that witnesses were invited to come before the Grand Jury if they had anything and suddenly this comes up all at the last minute and to use their witness to bring in this red herring and prejudice this jury by a matter that is not connected or affecting this trial, to induce or procure to prostitution. It is remote and disassociated and a completely independent matter.

Mr. Hurley: I offer merely to show the credibility of the government's witnesses and the feelings and animosity that they have in the case against the defendant, Raymond Wright, and for no other purpose.

The Court: No foundation laid for such a question. Objection is sustained.

(The following proceedings were had in the presence and hearing of the jury:)

Mr. Hurley: Just a second, your Honor, That's all. You may cross-examine.

Cross-Examination

By Mr. Hepp:

Q. Just a minute. Did you say that you worked for Mrs. Wright out at the Cotton Club?

A. I did.

(Testimony of Willa May Walters.)

Q. What was the nature of your work? [110]

A. Most anything she had to do around there. House work.

Q. Did you entertain men out there?

Mr. Hurley: We object to that, as incompetent, irrelevant and immaterial, not proper cross-examination. She said she worked for Mrs. Wright and the case has been dismissed against Mrs. Wright.

The Court: I will sustain the objection. Question of entertaining men is too vague. That is cross-examination.

Mr. Hepp: Sir? I didn't hear—quite understand your last statement?

The Court: Words, "entertaining men" is too vague. This is cross-examination.

Q. (By Mr. Hepp): Have you ever worked as a prostitute out at the Club 69, Willa May?

A. (Pause.) At one time.

Q. What time was that?

A. When I first came.

Q. And what was the dates that you worked as a prostitute, Willa May?

A. During the first month that I came here, in January.

Q. Last January? And that was for one month?

A. That's right.

Q. And you have not worked as a prostitute since— (Interrupted.) [111] A. No.

Q. Since January? A. No.

Q. You have done house work? Is that right?

(Testimony of Willa May Walters.)

A. That's right. Since then, I was taking my meals there and I have my own—house of my own. I was paying Mrs. Wright for my meals since then.

Q. Did you ever live at the Cotton Club?

A. At one time.

Q. How long? Over what period of time?

Mr. Hurley: We object to that if the Court please; incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Hepp: I would like to comment to the court that she testified that she knows things that go on out there. I believe I have a right— (Interrupted.)

The Court: I ruled on the question.

Mr. Hepp: No further questions.

Mr. Hurley: Just a minute.

Redirect Examination

By Mr. Hurley:

Q. Did you rent a cabin out there for a while and live in it? A. I did. [112]

Q. And took your meals where?

Mr. Hepp: I object to any further questions for the same reason that counsel objected?

The Court: Objection sustained.

Mr. Hurley: That's all.

(Willa May Walters was excused and left the witness stand.)

Mr. Hurley: I call Eva Kelly.

EVA KELLY

called as a witness in behalf of the Defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Hurley:

Q. What is your name? A. Eva Kelly.

Q. Where do you live?

A. I live at 648-4th.

Q. Here in Fairbanks? A. Yes.

Q. How long have you lived here?

A. Since 1946.

Q. Are you acquainted with Eleanor Jones—
Elnora Jones?

A. Yes, she's my partner in the Triple X.

Q. How long have you known her? [113]

A. Since 1946.

Q. And did you know Vanada Donaby?

A. Not personally.

Q. You never were acquainted with her?

A. No.

Q. Well, were you out there when she was working for Eleanor Jones? A. No, I wasn't.

Q. Where were you?

A. I was in town.

Q. What? A. I was here in town.

Q. Do you know what Eleanor Jones' business or occupation has been?

(Testimony of Eva Kelly.)

Mr. Hepp: I object to that unless it is related into this trial. This Eleanor Jones seems to be cropping up all the time, your Honor, and she is not on trial here. There—it has nothing to do with this case and unless counsel lays a foundation—— (Interrupted.)

Mr. Hurley: The only thing is the—Vanada Donaby testified that she came up here originally to see Eleanor Jones and I want to see—to show what kind of person she was.

Mr. Hepp: Your Honor, showing that doesn't—there is no showing that she would know or anything else. [114] You don't condemn anybody by some of their friends or acquaintances or employers. I have worked for people in my lifetime and I wouldn't want to share their reputation.

The Court: Question is too broad, Mr. Hurley. I will sustain the objection.

Q. (By Mr. Hurley): Did you ever have occasion to discharge Vanada Donaby?

Mr. Hepp: I object to that unless that is shown to bear on this case here, your Honor. She said she wasn't even out—never had been out there while Vanada Donaby worked there. That's her own statement. I don't believe that that would be relevant.

The Court: Objection sustained.

Mr. Hurley: That's all.

Mr. Hepp: No further—no questions.

(Eva Kelly was excused and left the witness stand.)

Mr. Hurley: We will call Mrs. Wright.

VERNESTINE WRIGHT

called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hurley:

Q. Speak up loud so we can hear you, Mrs. Wright. What [115] is your name?

A. Vernestine Wright.

Q. And are you the wife of the defendant, Raymond Wright? A. Yes.

Q. How long have you and the defendant been married? A. 8 years.

Q. Where were you married?

A. Ogden, Utah.

Q. And do you have children? A. Yes.

Q. How many? A. Two.

Q. And how old are they?

A. Two and three.

Q. Where were they born?

A. Fairbanks, Alaska.

Q. They both boys or both girls?

A. One girl and one boy.

Q. Which one is the older? A. The girl.

Q. Now, you were in the courtrooms, were you, when Vanada Donaby testified?

A. I was.

Q. Did you ever tell her or say anything to her about working as a prostitute out at your [116] place? A. I did not.

(Testimony of Vernestine Wright.)

Q. Did she ever turn any money over to you or the defendant?

Mr. Hepp: I object to these leading questions, your Honor. They just suggest the answer that counsel wants to get. He is putting words—— (Interrupted.)

Mr. Hurley: I can't find out any other way.

The Court: Objection overruled.

Q. (By Mr. Hurley): Just answer the question. A. No.

Q. What was she doing out there?

A. She was assisting me with the house work, the cooking and serving drinks.

Q. Who owns the 69 Club?

A. The property I do.

Q. And did you run it? A. I did.

Q. In the evenings, where did you and your husband live at that time when you were running—when you had the 69 Club, Mrs. Wright?

A. Well, I was living at the 69 Club.

Q. And where was—— (Interrupted.)

A. He was living at the Cotton Club.

Q. And was he around there in the evenings, Mr. Wright? [117]

Mr. Hepp: I object to this unless counsel fixes some kind of a date as to the—when this all was happening.

Mr. Hurley: Well—— (Interrupted.)

The Witness: Could have been part of the last three years.

Q. (By Mr. Hurley): During the month of

(Testimony of Vernestine Wright.)

April in 1950, was he around there in the evenings?

A. He was never around there in the evenings.

Q. During April, 1950?

A. Not unless he came in once or twice.

Q. And where was he staying?

A. Over at the Cotton Club.

Q. And where would the children—— (Interrupted.) A. They were in the States.

Q. What? A. They were in the States.

Q. In April? A. Yes.

Q. What were they doing out there?

A. My little boy has been to a specialist for a year.

Mr. Hurley: That's all. [118]

Cross-Examination

Q. (By Mr. Hepp): You say Mr. Wright didn't live out at the Cotton—which place is which, Mrs. Wright? Now you referred to the Cotton Club and to the Club 69. Would you explain that?

A. The Cotton Club is on 23rd and Abigail and the Club 69 is on 28th on Cushman.

Q. And where did you live?

A. I lived at the Club 69.

Mr. Hurley: Where?

The Witness: Club 69.

Q. (By Mr. Hepp): And where did Raymond live?

A. He had been living over at the Cotton Club.

(Testimony of Vernestine Wright.)

Q. Never came around the Club 69, is that right?

A. Oh, he came around in the mornings, but never in the evenings; never in the evenings.

Q. Were you estranged from your husband during that time, Mrs. Wright?

A. No, I wasn't.

Q. Any particular reason why you didn't live together?

A. Yes.

Q. What was the reason?

A. Well, we were building a home at the old Cotton Club and he lived over there. We had quite a few fires. He thought he had better stick around the property and watch it. That's [119] the only reason.

Q. He went over to the Cotton Club then because he was building and watching out for fires?

A. Watching the property over there, yes.

Q. Did Willa May Walters just work as a housekeeper for you, too?

A. That's all.

Q. And your children were in the States?

A. My children was in the States.

Q. And your husband was at the Cotton Club?

A. Yes.

Q. And yet you have two housekeepers?

A. Well, Willa May Walters wasn't working for me when Vanada was.

Q. Oh, wasn't she out there at all?

A. She came around but she wasn't living there. She was living on 23rd and Mercer at her own house.

(Testimony of Vernestine Wright.)

Q. How much time would she spend a day?

A. Oh, she come over practically every day, take meals with me.

Q. Always leave by five o'clock, six o'clock in the evening, though?

A. Not all the time. I couldn't tell you when she would leave. Her hours was very infrequent.

Q. Have you ever been convicted of a crime, Mrs. Wright? [120]

A. Yes.

Mr. Hepp: I have no further questions.

Redirect Examination

By Mr. Hurley:

Q. When did the children come up to Alaska from outside?

A. About two months ago.

Mr. Hurley: That's all.

Mr. Hepp: No further questions.

(Mrs. Vernestine Wright was excused and left the witness stand.)

Mr. Hurley: Call Ray Wright.

RAYMOND WRIGHT

called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hurley:

Q. What is your name?

A. Raymond Wright.

(Testimony of Raymond Wright.)

Q. And where do you live, Mr. Wright?

A. 23rd and Abigail.

Q. Here in Fairbanks? A. Fairbanks.

Q. How long have you lived here in Fairbanks?

A. Since 14th of April, '47. [121]

Q. When was your little girl born?

A. She was born on the 16th of September, 16th of September, 1947.

Q. And are you familiar with the 69 Club?

A. Yes, I am.

Q. And who owns that?

A. That is owned by my wife.

Q. And what was it used for?

A. It was used for a club room and place for the colored people to gather.

Q. Did you know a woman by the name of Donaby, Vanada Donaby, Mr. Wright?

A. I did.

Q. Did she ever work out there for your wife?

A. She did.

Q. Was she working for your wife or working for you? A. She was working for my wife.

Q. Were you there when she was employed?

A. I wasn't at the Club 69, no.

Q. Were you there at the time your wife employed her? A. Oh, no.

Q. And do you know the arrangement—what the arrangement was between your wife and Vanada Donaby?

Mr. Hepp: I object—just a minute—I object to that unless there is a foundation showing—he [122] said he wasn't there.

(Testimony of Raymond Wright.)

The Court: Objection sustained.

Q. (By Mr. Hurley): Well, did you ever employ her as a prostitute?

A. I had no place for prostitution.

Q. Just answer the question. A. No.

Q. Never did? A. No.

Q. And you heard the testimony of this man, William Jones? A. Yes.

Q. When he said that he had seen her go out with men and come back and give you money, did anything of that kind ever occur there at the Club? Did this Vanada Donaby ever go out with men and come back, with \$20 bills at any time, to you, Mr. Wright?

Mr. Hepp: I object to this witness being asked that, your Honor, unless he shows that he was around there to see what was happening.

The Court: Objection overruled.

Q. (By Mr. Hurley): Is that true?

A. She never did.

Q. Did you ever say anything to Vanada Donaby about coming out to the 69 Club to work? [123]

A. I never did. She was working there before I knew she was employed.

Q. Did you know two girls—women—whatever they were, that were mentioned by Nathaniel Woods, one he said was called Opal and one he said was called Shorty? A. Yes, I knew them.

Q. How long have you known them?

A. Well, Mrs. Weldon—— (Interrupted.)

Q. What is the first name?

(Testimony of Raymond Wright.)

A. Opal Weldon.

Q. How do you spell that last name?

A. W-e-l-d-o-n.

Q. She came up here when?

A. They came up in January the 7th.

Q. Opal Weldon? A. Yes, sir.

Q. And who came with her?

A. There was a girl named Bessie Johnson, Mr. Weldon and—those three came together.

Q. And did Opal Weldon or her husband ever live out there at your place?

A. The only place they ever lived.

Q. Did they both live there?

A. They both lived there.

Q. And where did they live? [124]

A. They lived in a cabin outside the Club 69 after it was moved to the 69 Club. But before that, they lived at the Cotton Club.

Q. And did this Opal Weldon work out there for you or your wife?

A. She didn't work to my knowledge.

Q. And what did her husband do there?

A. He was—several janitorial jobs.

Q. And what was his first name, do you remember? A. David.

Q. And this woman that he spoke of as Shorty, do you know who he meant? A. Yes.

Q. What is her name?

A. Her name was Jean Miller.

Q. Jean Miller? A. Jean Miller.

Q. Just a minute. A. Mrs.

(Testimony of Raymond Wright.)

Q. Do you know—did you know her husband?

A. Yes.

Q. And what was he doing here?

A. He had a job out at the base I think it was.

Q. And where did they live?

A. They were living at a cabin at the Cotton Club for a [125] while.

Q. What?

A. One of the cabins over at the Cotton Club.

Q. And did you—were they living together?

A. They were.

Q. And did she ever work there for you or for Mrs. Wright? A. She never did.

Q. They just lived out there—— (Interrupted.)

A. In one cabin.

Q. That you—that they rented from you, she and her husband? A. That's right.

Q. Did you ever threaten this Vanada Donaby if she would—attempted to leave; that you would kill her or make any threats of any kind in regard to her? A. No, I never did.

Q. Did you ever try to restrain her from any liberties in any way? A. No kind of way.

Q. Did you ever strike her or knock her on her face? A. No; no, sir.

Q. You heard her testimony here that you never laid your hands on her, didn't you?

Mr. Hepp: I object to that. Counsel—in the first place, that wasn't what was said. [126]

Mr. Hurley: Yes, it was.

The Court: Objection sustained.

(Testimony of Raymond Wright.)

Q. (By Mr. Hurley): And when—did you swear out a complaint against William Jones and Nathaniel Wood charging them with a larceny, Mr. Wright? A. I—— (Interrupted.)

Mr. Hepp: I object to that unless it is shown that it has some place in this trial or has any relationship. It keeps cropping up like some of these other things, your Honor. It has no relationship to the issues before this court.

Mr. Hurley: It has been admitted. It shows the bias of these witnesses.

The Court: Objection sustained.

Mr. Hurley: That's all. You may cross-examine.

Cross-Examination

By Mr. Hepp:

Q. Who is living at the Club 69 now, Mr. Wright?

A. Like the Cotton Club, this Club 69 has been closed.

Q. Who closed it?

A. I would say Mr. Hepp closed it.

Q. How was it closed? [127]

A. I don't know anything about the legal procedures.

Q. Well, I mean, by what means is it closed?

A. Well, he sends me a bunch of papers and he sends the Marshal to put a padlock on the door.

Q. Did you read any of the papers, Mr. Wright?

A. I give them to my lawyer.

(Testimony of Raymond Wright.)

Q. You didn't see the District Judge's signature on the papers by any chance, did you?

A. I give it to my lawyer. That's his job.

Q. Well, if the District Judge's signature——
(Interrupted.)

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial, as to—— (Interrupted.)

Mr. Hepp: Your Honor—— (Interrupted.)

Mr. Hurley (Continuing): ——whose signature was on the papers. The papers are the best evidence. It isn't up to him to know what they contained.

Mr. Hepp: He has testified concerning the Cotton Club. I believe I can go into it, your Honor.

Mr. Hurley: It doesn't have anything to do with this case.

The Court: Objection sustained. Show him any summons you claimed was served on him.

Q. (By Mr. Hepp): Well, isn't it true, Mr. Wright, that they were closed for [128] prostitution?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Hurley: No foundation laid.

Q. (By Mr. Hepp): I was just a little curious, Mr. Wright. Did you state whether or not you lived at the Club 69 while Vanada Donaby was there? A. Did you ask me that question?

Q. No. In response to counsel—— (Interrupted.)

Mr. Hurley: I never asked him the question.

(Testimony of Raymond Wright.)

Mr. Hepp: Just a minute, Mr. Hurley. Let him answer.

Q. (By Mr. Hepp): Did you state whether or not you were living out there under direct examination?

Mr. Hurley: Well, I object to that as not proper cross-examination. I never asked him the question.

Mr. Hepp: I believe I can ask him whether he stated if he did or not, your Honor.

The Court: Well—— (Interrupted.)

Mr. Hepp: I don't just recall the testimony too clearly.

The Court: I will sustain the objection. [129] Ask him a direct question.

Q. (By Mr. Hepp): Did you live out at the Club 69 at the time when Vanada Donaby lived out there?

A. There might be several nights when I did live out there with my wife.

Q. Were you there a substantial portion of the time, Mr. Wright?

A. That all depends on what you mean by "substantial."

Q. Well, half of the 24 hours of the day.

A. I wouldn't say that.

Q. One-quarter of the day?

A. Well, I was quite irregular.

Q. Then you wouldn't know whether she entertained men or not, is that right, Mr. Wright?

A. Well, I would have to be in the room with

(Testimony of Raymond Wright.)

them and see it done to convince me. She could never convince me.

Q. Well now, Mr. Wright, I don't believe that you said that you never knew that, whether she entertained men. You stated that she never did entertain men. Now how do you know that if you weren't there?

A. To whom did I state that she never did——
(Interrupted.)

Q. I believe you stated it to the jury and to the attaches of the court.

Mr. Hurley: I don't think he did. [130]

Mr. Hepp: Well, I have it written down, your Honor.

Mr. Hurley: I don't believe that that is evidence.

The Court: Just a moment. If you have an objection, make it. I don't want an argument between counsel.

Mr. Hurley: Well, I object to that as incompetent, irrelevant and immaterial for the reason that he never said it and he is attempting to convince the witness by stating that he testified to something that he didn't testify to. He said he didn't know anything about anybody staying out there.

The Court: Objection is overruled.

Q. (By Mr. Hepp): Would you answer the question?

A. What was the question, please?

Q. Mr. Wright, if you were not present any

(Testimony of Raymond Wright.)

more than a quarter of the time or whatever period of time you stated you were present at the Club 69, how would you know whether or not Vanada Donaby entertained men out there?

A. Mr. Hepp, if I was present all the time, how would I know?

Q. Did you state whether or not she did entertain men out there? [131]

A. I testified that I did not know whether she entertained men.

Q. Well, that's all right. Have you ever been convicted of a crime, Mr. Wright?

A. What is considered a crime?

Q. You mean you don't know what a crime is? I am inclined to believe that, Mr. Wright. That almost stops me, your Honor. Have you ever been convicted by any judge of a criminal act?

A. In the Territory of Alaska?

Q. Anyplace?

A. I don't think I have, sir. I was found guilty of a crime.

Q. Isn't that a conviction, Mr. Wright?

A. My interpretation of a conviction is when you serve time or be sentenced for it—serve time for it.

Q. Well, you could pay a fine, you could have a suspended sentence or—— (Interrupted.)

A. That too is my idea of a conviction.

Q. Oh. Has a court ever pronounced you guilty of a crime, Mr. Wright? A. Yes.

Mr. Hepp: I believe that's all.

Mr. Hurley: That's all, your Honor. Defendant rests. [132]

(Mr. Raymond Wright was excused and left the witness stand.)

Mr. Hepp: May I have—well, your Honor, it is nearly 12 o'clock——

The Court: Let's see, Mr. Clerk——

Mr. Hurley: Do you have any other witnesses?

The Court: We have something at 1:30?

Clerk of the Court: We do, your Honor, yes.

The Court: In a few minutes, we will adjourn court until one-thirty but the jury will be excused until two o'clock. Upon adjournment, you will be excused until two o'clock. In the meantime, remember not to talk about the case among yourselves or with anyone or to permit anyone to talk about it within your hearing. Keep your minds perfectly free from any opinion as to the guilt or innocence of this defendant until the case is finally submitted to you. Recess to one-thirty.

(At this time, the trial of this cause was adjourned until 2 p.m., November 6, 1950.)

(At 2 p.m., November 6, 1950, came the respective counsels as heretofore, came the defendant in person, and the trial of cause number 1507 criminal was resumed, the Honorable Harry E. Pratt, District Judge, [133] presiding.)

The Court: Call the roll of the jury.

(The Clerk of the Court called the roll of the jury, each juror answering to his or her name.)

Clerk of the Court: They're all present, your Honor.

The Court: In the form of verdict which copy have been served on the attorneys, in the last line after the word "prostitution" interlineate the words "as set forth" and the following as a last sentence should be, "Dated at Fairbanks, Alaska, this blank day of November, 1950." That should be added to it. Counsel ready to proceed with the trial of this case?

Mr. Hepp: I am ready, your Honor.

The Court: Very well.

Mr. Hepp: I would like to call one witness in rebuttal.

The Court: Very well.

Mr. Hepp: Call Vanada Donaby, please.

VANADA DONABY

having been previously sworn, resumed the witness stand and testified as follows:

Direct Examination in Rebuttal

By Mr. Hepp:

Q. Miss Donaby, do you know a person named Dora Woods? A. No, I don't. [134]

Q. Have you ever had any one pointed out to you that was named Dora Woods?

A. Yes, I have.

(Testimony of Vanada Donaby.)

Q. When was that? A. This morning.

Q. Have you ever seen that person before?

A. No, I haven't.

Q. During the year of 1945, were you ever around any project known as the Hanford Works or some similar name, Miss Donaby?

A. No, I wasn't.

Mr. Hepp: You may question the witness.

Cross-Examination in Rebuttal

By Mr. Hurley:

Q. Where were you living in 1945?

A. Gem Hotel.

Q. Whereabouts?

A. In Seattle, Washington.

Q. What? A. In Seattle, Washington.

Q. You didn't work at Hanford at all?

A. Not in 1945.

Q. When did you work there?

A. 1943. [135]

Q. What were you doing there?

A. Bus girl.

Q. That was in 1943, was it?

A. That's right.

Q. What? A. That's right.

Q. You couldn't be mistaken that it was '45?

A. No, I couldn't.

Q. How do you know it was 1943?

A. Because I know it was '43.

Q. But you did work at Hanford?

(Testimony of Vanada Donaby.)

A. '43, yes.

Q. And what were you doing?

A. Bus girl.

Q. I see. And what was Dora Woods doing there when you were working there?

A. I don't know Dora Woods.

Q. You never heard of a girl commonly known as Peaches there in Hanford?

A. No, I haven't.

Mr. Hurley: That's all.

Mr. Hepp: That's all.

(Miss Vanada Donaby was excused and left the witness stand.)

Mr. Hepp: I would like to come forward, [136] your Honor, with a proposition.

The Court: Yes.

Mr. Hepp: I would like to come forward to the bench.

The Court: Yes.

(The following proceedings were had out of the presence and hearing of the jury.)

Mr. Hepp: Your Honor, I have sent wires, quite a number of them, to Seattle and to Hanford. Now, the replies to those wires is likely to take some time because these records are old. I hesitate to ask the court to hold this trial over or upon return of that, but I will ask that a reasonable time be given to allow the return of those wires. I don't feel that it is an indispensable part of this trial and

I am not going to urge the matter. I thought I would make it a matter of record that I have sent those wires, your Honor.

Mr. Hurley: I would—— (Interrupted.)

The Court: Motion denied.

Mr. Hurley: I would like to have a chance to get some information down there myself, your Honor, as far as that is concerned.

The Court: Well, I don't want to delay the trial. It wouldn't be admissible anyway as far as I can see. [137]

(The following proceedings were then had in the presence and hearing of the jury.)

Mr. Hepp: I will rest the government's case in rebuttal.

Mr. Hurley: We rest, your Honor.

The Court: How much time do you want for argument, each side.

Mr. Hepp: An hour is adequate for me, your Honor.

Mr. Hurley: I don't expect to take any more than an hour as far as I am concerned.

The Court: Very well. One hour to a side. Proceed with your argument.

(At this time, Mr. Hepp presented his opening argument to the jury.)

(At the conclusion of Mr. Hepp's opening argument to the jury, Mr. Benton presented the opening argument to the jury for the defendant.)

(At the conclusion of Mr. Benton's presentation to the jury, Mr. Hurley requested a ten minute recess, which request was granted by the court.)

(The trial of this case resumed and the Clerk of the Court called the roll of the jury at the court's request, each juror answering to his or her name, and at this time, Mr. Hurley presented, on behalf of the defendant, [138] the closing argument to the jury.)

(At the conclusion of Mr. Hurley's argument to the jury, Mr. Hepp presented, on behalf of the government, his closing argument to the jury.)

(At the conclusion of counsels' arguments to the jury, the following proceedings were had.)

The Court: Mr. Hepp, Mr. Benton, I am making a little change in instruction number three. That is next to the last line, cross out the first three words which are "willing to be" and insert "easily."

(At this time, the Court read the instructions to the jury as follows:)

Instructions to the Jury

I.

A. The indictment in this case charges as follows: that on or about the 14th day of April, 1950, in the Fourth Judicial Division, Territory of Alaska, Raymond Wright feloniously induced and

procured a woman, to wit, Vanada Donaby, for the purpose of prostitution;

B. (1) The word "induce" as used in the indictment in this cause has the following meanings: to influence; to prevail on; to move by persuasion or influence; to bring about; to effect; to cause;

(2) The word "procure" as used in said indictment has the following meanings: to bring into possession; to acquire; to get; to obtain; [139]

(3) The word "prostitution" as used in the indictment in this case means the practice of a female offering her body to indiscriminate sexual intercourse with men for hire.

(C) Although it is alleged in the indictment that the crime denounced therein was committed on or about the 14th day of April, 1950, it is only necessary that the plaintiff, the United States, prove beyond a reasonable doubt that the crime denounced in said indictment was committed within three years prior to the date of the indictment, to wit, October 17, 1950. Consequently, the jury should consider that proof beyond a reasonable doubt that said offense charged in the indictment herein was committed within three years prior to October 17, 1950, is proof of the allegation in said indictment that said offense was committed on or about the 14th day of April, 1950.

II.

You are instructed that the Indictment is a mere accusation and is not in itself any evidence of the defendant's guilt.

The defendant has pleaded not guilty to the matters set forth in said Indictment. That plea puts in issue every material allegation of the Indictment and puts the burden of proof upon the plaintiff to prove every such allegation beyond a reasonable doubt. The defendant is presumed to be [140] innocent and until the plaintiff has proven every material allegation of said indictment beyond a reasonable doubt, the defendant is entitled to the continued benefit of the presumption of his innocence.

III.

A. If the jury believes that the evidence in this case has failed to prove beyond a reasonable doubt any allegation of the indictment herein as to the defendant, Raymond Wright, the jury should find the said Raymond Wright not guilty of the crime set forth in the indictment.

B. If the jury believes that the evidence in this case has proved beyond a reasonable doubt that the defendant, Raymond Wright, within three years prior to October 17, 1950, in the Fourth Judicial Division, Territory of Alaska, did then and there induce and procure a woman, to wit, Vanada Donaby, for the purpose of prostitution, the jury should find said defendant, Raymond Wright, guilty of the crime set forth in the indictment.

What has been said above in this sub-paragraph is true regardless of whether or not said Vanada Donaby had been a prostitute prior to the time in the spring of 1950 when she went to the Club 69 to live. Likewise, what is said above in this sub-

paragraph is true even if said Vanada Donaby was easily influenced to become a prostitute at said Club 69 in the spring of 1950. [141]

IV.

You are instructed that, as used with reference to the case now on trial:

The word "wilfully" means intentionally and deliberately, and implies knowledge on the part of the wrongdoer.

The word "unlawfully" means forbidden by law.

The word "feloniously" means the unlawful doing of an act which may be punished by imprisonment in the penitentiary, such as the crime charged in this case. The word "unlawfully" is included in the word "feloniously."

V.

In regard to the term "reasonable doubt," as used in these instructions and as defined by law, you are instructed as follows:

(a) If, after considering all of the evidence in the case, there is in the minds of the jury a fixed conviction that the defendant is guilty, the jury would be justified in considering that there is no reasonable doubt in the minds of the jury in the sense in which the term is used in these instructions.

(b) A doubt, to be such a reasonable doubt, must have an actual and substantial basis and not be a mere fanciful speculation. It cannot be a reasonable doubt if it ignores a reasonable interpretation of the evidence. The [142] rule of law as to a reason-

able doubt is a practical rule for the guidance of practical jurors when engaged in the solemn duty of assisting in the administration of justice. To prove a proposition beyond a reasonable doubt, the evidence must be such that it would convince a reasonably prudent man of its truth to such a degree of certainty that he would feel like acting upon such conviction in matters of the highest importance to his own personal interests.

In other words, a reasonable doubt is one which is reasonable in view of all of the evidence and such as arises upon an impartial comparison and consideration of all evidence and prevents the jury from being able to say candidly and truthfully that they have an abiding conviction of the defendant's guilt.

VI.

The jury is instructed that they should bring to bear upon the consideration of the evidence or lack of evidence in this case all of the common knowledge of men and affairs which they, as reasonable human beings, have and exercise in everyday affairs of life. Accordingly, you should draw from the evidence or lack of evidence in this case all deductions which appear to you to flow logically from the evidence or lack of evidence. Whatever verdict is warranted by the evidence under the instructions of the Court, you should return as you have sworn [143] to do.

VII.

You are instructed that a person charged with the commission of a crime shall at his own request, but not otherwise, be deemed a competent witness

in his own behalf—the credit to be given to his testimony being left solely to the jury under the instructions of the court.

You are instructed that in this case the credit to be given to the testimony of the defendant, who has voluntarily offered himself as a witness and testified in his own behalf, is left solely to you and you should give it the same fair and candid consideration as you do the testimony of other witnesses in the case, but you have a right to take into consideration the interest of the defendant in the result of the trial as affecting his credibility.

VIII.

In determining the credit you will give to a witness and the weight and value you will attach to his testimony you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to or feeling for or against any of the parties to the cause; the probability or improbability of his statements; the opportunity he had to observe and to be informed and the inclination he evinced to speak the truth or otherwise as to matters [144] within his knowledge. It is your duty to give to the testimony of each and every witness appearing before you such credit as you consider the same justly entitled to receive.

You are further instructed that in your consideration of the evidence in this case you should analyze it in the light of the knowledge which your

experience in life has given you, and you should draw from the evidence all logical and natural deductions and be governed accordingly.

IX.

You are instructed that the laws of the Territory of Alaska lay down the following general rules for your guidance as to the value of evidence, to wit:

1. That you are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying to your minds.

2. That a witness wilfully false in one part of his testimony may be distrusted in others.

3. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore,

4. That if the weaker and less satisfactory evidence is offered when it appears that stronger and more [145] satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

5. That oral admissions of a party should be viewed with caution.

X.

You are instructed as follows:

1. That you should not consider any evidence

sought to be introduced, but excluded by the court, nor should you consider any evidence that has been stricken from the record by the court;

2. That it is manifestly impossible for the court to cover the law of this case in a few instructions and that, therefore, you should consider all the instructions together and not disconnectedly;

3. That wherever in these instructions the masculine is used, it shall be deemed to include the feminine, unless the context shows it to be inapplicable.

4. That you should endeavor to agree upon a verdict and should calmly reason with your fellows with the view of arriving at a verdict. You should not refuse to agree from pride of opinion, nor should you surrender any conscientious views founded on the evidence or lack of evidence.

5. That wherever in these instructions the singular is used, it shall be deemed to include the [146] plural, unless the context shows it to be inapplicable.

XI.

Pursuant to the foregoing instructions, I have prepared a form of verdict, which is more or less self-explanatory for you take into your jury room. You should elect a foreman and by him or her sign the verdict upon which you unanimously agree, and return it into the court as your verdict.

In the blank in said form of verdict, you should insert the words "guilty" or "not guilty" according to your finding as to the defendant, Raymond Wright.

Herewith I hand you these instructions for your guidance, together with the above-mentioned form of verdict, the indictment in this case, and the exhibits that have been introduced in evidence. Return all of these into court with your verdict.

Dated at Fairbanks, Alaska, this 6th day of November, 1950.

HARRY E. PRATT,
District Judge.

(At the conclusion of the court reading the above instructions to the jury, the following proceedings took place:)

The Court: Attorneys can come forward at this time and take exceptions. [147]

(The following proceedings were had out of the presence and hearing of the jury:)

Mr. Benton: If your Honor please, I guess it is "C" in—under 1, where it mentions about the three year part, I except to that.

Mr. Hepp: On what grounds, Mr. Benton?

Mr. Benton: Upon the grounds that it is too remote, that it is set up in the indictment "on or about" and that it must be proven "on or about" the date set out in the indictment and not within the three years. I believe the next exception is practically the same. That is instruction number three "B". I believe that is it. It has to do with the same thing, your Honor, the three year period. That I except to.

Mr. Hepp: Your Honor, I oppose those—— (interrupted).

The Court: Yes, I will overrule it. Is that all, Mr. Benton?

Mr. Benton: Then the other change from “willing to be” to “easily”.

The Court: That was the change that was made, yes.

Mr. Benton: That was the change that was made, your Honor. I just want to except to those and you ruled on them? [148]

The Court: Yes, I deny the—overrule the objections. Do you have any, Mr. Hepp?

Mr. Hepp: No, I have none, your Honor.

The Court: Very well.

(The following proceedings were had in the presence and hearing of the jury:)

The Court: The jury may retire in the custody of the bailiffs.

(Annella Davis and Alfred Barber were duly sworn as bailiffs, and at 3:55 p.m., the Jury, in charge of its sworn bailiffs, retired to enter upon its deliberations.)

United States of America,
Territory of Alaska—ss.

I, Charles Belida, the Official Court Reporter for the above-named court, do hereby certify,

That I am the Official Court Reporter for the United States District Court, Fourth Judicial Division, District of Alaska, that I was present in open

court upon the 3rd and 6th days of November, 1950, the dates on which the trial of cause number 1507 criminal were had,

That I recorded in shorthand all of the oral proceedings had in open court,

That the foregoing pages, numbered 1 through 149, inclusive, constitute a full, true, complete and accurate transcript of my original shorthand notes taken at the time of trial.

Dated at Fairbanks, Alaska, this 11th day of January, 1951.

/s/ CHARLES BELIDA,
Official Court Reporter.

Subscribed and sworn to before me this 11th day of January, 1951.

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

[Endorsed]: Filed January 23, 1951. [149]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings as per Praeceptum for Transcript of Record by Appellants in the above-entitled cause, viz:

1. Indictment	1
2. Motion to Dismiss	3
3. Order Overruling Motion to Dismiss Indictment	4
4. Order, Plea and Setting Time for Trial....	5
5. Verdict	6
6. Judgment and Commitment	7
7. Exhibit Number 1.....	8
8. Notice of Appeal	9
9. Order of Release.....	10
10. Order Extending Time to File, Record and Docket Transcript	11
11. Praeceptum for Transcript of Record.....	12
12. Transcript of Testimony and Trial (Pgs. 1-149)	—

Witness my hand and the seal of the above-entitled Court, this 23rd day of February, 1951.

[Seal] /s/ JOHN B. HALL,

Clerk of the District Court,
Fourth Judicial Division,
Territory of Alaska.

[Endorsed]: No. 12868. United States Court of Appeals for the Ninth Circuit. Raymond Wright, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Fourth Division.

Filed February 26, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12868

RAYMOND WRIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Comes now the Appellant above named by his attorneys, Julien A. Hurley and Quincy W. Benton, and respectfully requests and designates the entire record including all the testimony be printed for submission to the Court in the above-entitled criminal action.

The points to be relied upon by Appellant are as follows:

1. Errors of the Court in admitting evidence offered by Appellee which was objected to by Appellant and admitted over the objections of Appellant and which evidence was incompetent, irrelevant and immaterial and which was prejudicial to the rights of Appellant.

2. Testimony of Appellant which was offered in evidence and which was objected to by attorney for Appellee and which was excluded by the Court which under the law was admissible. Rulings of

the Court on such objections refers not only to direct evidence but to cross-examination of Appellee's witnesses.

3. Errors of the Court in instructing of the jury as to the law of the case and which instructions were objected and excepted to by the Appellant, the reasons being stated why they were erroneous by the attorneys for Appellant.

That the only copy of the transcript and the record has been sent to San Francisco for printing and the points relied upon will be more fully defined and set forth in Appellant's Brief.

/s/ JULIEN A. HURLEY, [152]

/s/ QUINCY BENTON,

Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 5, 1951. [153]

No. 12,868

IN THE

United States Court of Appeals
For the Ninth Circuit

RAYMOND WRIGHT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

JULIEN A. HURLEY,

Fairbanks, Alaska,

Attorney for Appellant.

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No. 12,868

IN THE

United States Court of Appeals
For the Ninth Circuit

RAYMOND WRIGHT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT.

Appellant, Raymond Wright, and his wife, Verne-
stine Wright, were indicted by the Grand Jury for the
Fourth Division for the Territory of Alaska, for felo-
niously inducing and procuring a woman one, Vanada
Donaby, for the purpose of prostitution in violation of
Section 65-9-21 of the Alaska Compiled Laws Anno-
tated, 1949. At the close of the appellee's case the
United States Attorney moved that the indictment be
dismissed as to the defendant Vernestine Wright, and
the motion was granted. (T.R. p. 85.)

The appellant, Raymond Wright, was convicted of
the crime charged in the indictment and was sen-
tenced to serve a term of three years in the peni-
tentiary at McNeil's Island, Washington.

The principal objections of appellant are to the rulings of the trial Court in refusing to admit competent and relevant testimony and refusing to permit sufficient cross-examination of the witnesses produced on behalf of the government.

The principal witnesses on behalf of the government were William Jones and Nathaniel Wood who were accused of stealing \$800.00 from appellant, and they were arrested upon a warrant issued based upon a criminal complaint filed by appellant, and they, together with Vanada Donaby, the other witness in the case on behalf of the government, were arrested near the Canadian border and returned to Fairbanks, Alaska, and confined in the Federal Jail for a period of 4 or 5 days before being released. The attorneys for appellant were unable to find out why they were released or exactly what disposition of the case was made, although it was the intention of the appellant during the trial of the case to show that they had stolen the money, and that was the principal reason why they appeared as witnesses against appellant, and appellant hoped to show that there was some deal made on account of the evidence which they furnished in order to secure their discharge from custody.

POINTS AND AUTHORITIES.

“The fact that a witness is interested in the result of the action or proceeding in which he testifies, or is biased or prejudiced in favor of or against any of the parties thereto, is proper to be

shown and considered as bearing on the credit which should be accorded to his testimony, and where the interest or bias is denied by the witness, it may be shown by the testimony of others, and even where such interest or bias is admitted, the extent of it may be shown."

70 *C.J.*, Section 1144, 937.

"In prosecution for transportation of intoxicating liquor, exclusion of evidence tending to show ill feeling of prosecuting witness toward defendants was error.

"In criminal case anything tending to show ill feeling, bias, and motive of witness is competent evidence.

"Motives operating on mind of witness when he testifies are never immaterial, and adverse party may prove acts and declarations of witness tending to show ill feeling, bias, motive, and animus."

Smith et al. v. State, 291 S.W. 544;

Hostetter Co. v. Bower, 74 Fed. 235;

Sunderland v. United States, 19 F. (2d) 212,
Subparagraph 12.

"Where a witness has testified for the prosecution, his fair and full cross-examination on the suggestions of his examination in chief is an absolute right of the defendant, and a denial of that right is prejudicial error."

Gallaghan v. United States, 299 Fed. 172.

ARGUMENT.

One of the witnesses for appellee, Nathaniel Wood, testified that besides himself, Vanada Donaby and William Jones, a girl by the name of Willa May Walters was supposed to have left with them when they left Fairbanks, and when Wood and Jones were arrested for grand larceny. Willa May Walters was called as a witness on behalf of appellant and she testified that Vanada Donaby, William Jones and Nathaniel Wood talked to her about stealing, at which time she was interrupted by the United States Attorney and her answer was stricken by the Court. She was then asked if these same parties talked to her about stealing a safe or a little strong box in which the defendant, Raymond Wright, kept his money. Objection was made and the Court sustained the objection, after which offer of proof was made to show that the witness knew that Nathaniel Wood and William Jones planned to steal the money in the safe belonging to appellant. (T.R. pp. 105, 106, 107.) Appellant was prohibited by the Court upon objection by the United States Attorney from testifying as to when he swore to the complaint against William Jones and Nathaniel Wood charging them with larceny.

The Court limited the testimony on cross-examination in regard to the larceny of the money by the witnesses, Wood and Jones. (T.R. pp. 81, 82.) William Jones was permitted to testify over the objection of appellant that he did not steal \$800.00 or any amount, and appellant was refused permission to show that he and Nathaniel Wood had planned to steal the money.

Considering the rulings of the Court and the fact that appellant was unable to fully show the bias and prejudice of the witnesses, Wood and Jones, the jury undoubtedly believed that they had a right to give greater weight to their testimony than they would have believed otherwise if appellant had been allowed his rights under the rules of the admission of evidence and cross-examination of government witnesses.

In view of the Court's rulings in this case in regard to the admission of evidence and under the authorities, it would seem that the judgment of conviction should be reversed and a new trial ordered.

Dated, Fairbanks, Alaska,
July 6, 1951.

Respectfully submitted,
JULIEN A. HURLEY,
Attorney for Appellant.

No. 12,868

IN THE
United States Court of Appeals
For the Ninth Circuit

RAYMOND WRIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

EVERETT W. HEPP,

United States Attorney,

HUBERT A. GILBERT,

Assistant United States Attorney,
Fourth Judicial Division, Territory of Alaska,

Attorneys for Appellee.



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No. 12,868

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RAYMOND WRIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

JURISDICTION.

This is an appeal from the judgment of the District Court for the Territory of Alaska, Fourth Judicial Division, sentencing the defendant to imprisonment for three years in the Federal Penitentiary at McNeil Island, Washington. Said judgment was entered on the 22nd day of November, 1950 (Tr. of R. 7), pursuant to a jury trial and verdict of "Guilty" (Tr. of R. 6) of the alleged crime of procuring a woman for the purpose of prostitution as charged in the Indictment (Tr. of R. 3) based on Title 65, Chapter 9, Section 21 of the Alaska Compiled Laws Annotated, 1949 (Volume 3, page 2267). Notice of appeal was filed the 27th day of November, 1950. The jurisdiction of the

District Court was invoked under the Act of June 6, 1900, Chapter 786, 31 Stat. 322, as amended, 48 U.S.C., Section 101, likewise constituting Title 53, Chapter 1, Section 1, Alaska Compiled Laws Annotated, 1949, The jurisdiction of this court is invoked under Section 128 of the Judicial Code, as amended, 28 U.S.C., Section 225(a); now 28 U.S.C. New, Section 1291.

QUESTIONS PRESENTED.

Whether competent and relevant testimony was offered and refused admission by the trial court; and whether sufficient cross-examination of witnesses produced on behalf of the Government was permitted.

STATEMENT OF THE CASE.

During the month of April, 1950, the appellant, Raymond Wright, became acquainted with one Vanada Donaby, a 23-year old girl, and in the course of their acquaintance, he invited the said Vanada to come to his "Club 69" to live (Tr. of R. 21), with an offer of a job. Shortly after she had moved to the "Club 69", Raymond Wright advised her that as he had been spending his money on her, she was obliged to give money to him which she was to obtain by entertaining men (Tr. of R. 19, 20). Vanada had no money of her own (Tr. of R. 20). Immediately following the conversations between Raymond Wright and Vanada Donaby, the latter became a prostitute.

She had never been a prostitute previous to that time (Tr. of R. 20, 21).

Vernestine Wright, the appellant's wife, was also indicted for the crime of procuring a woman for prostitution and named as a co-defendant with Raymond Wright. While considerable evidence elicited at the trial showed Vernestine Wright to materially engage in the management of the "Club 69", during which management monies from prostitution were given to her, the evidence failed to establish that Vernestine Wright participated in the procuring of Vanada Donaby for the purpose of prostitution, and, accordingly, the Government moved to dismiss the indictment as to the said Vernestine Wright before resting its case. The motion was granted by the District Court (Tr. of R. 85).

Collateral with the issues before the trial court as set forth in the indictment is the proposition dealing with the relationship between two of the Government witnesses and the defendant, and since appellant's assignment of errors appears to deal almost solely upon this collateral matter, a statement in narrative form concerning same is thought by this appellee to be necessary for an understanding of the issues, and is, therefore, included. The Government's case was offered to the jury through three witnesses, one of whom was Vanada Donaby, a colored girl, the alleged victim of the procurement and chief prosecuting witness, and two colored men, William Jones and Nathaniel Wood, acquaintances of the defendant,

Raymond Wright, also colored, one of whom had lived on the premises of the "Club 69" (Tr. of R. 73), the other of whom had been employed by the defendant, Raymond Wright, about the premises of the "Club 69" and elsewhere (Tr. of R. 51, 52, 53). Shortly before the defendant's arrest on the procurement charge, and, in fact, being an event leading up to the arrest of the defendant for such charge, the two men helped Vanada Donaby to escape from the defendant, Raymond Wright, by spiriting her away from the "Club 69" and hiding out in a remote section of Fairbanks for over twenty-four hours (Tr. of R. 63, 64) before journeying south on the Alaska Highway, bound for the states. During this 24-hour interim, the defendant, Raymond Wright, was alleged to have driven to the border, presumably to secure the return of Vanada Donaby. Failing to do so, he returned to Fairbanks and swore out a complaint for the two men, charging Grand Larceny (Tr. of R. 63, 68, 69). It was on this complaint and a warrant issued thereon that the two Government witnesses were arrested subsequently at the border and returned to Fairbanks (Tr. of R. 79, 80), where they appeared before a committing magistrate (Tr. of R. 65), waived a preliminary hearing on advice of their counsel (Tr. of R. 68), and awaited the Grand Jury. They were never indicted by the Grand Jury which considered their bill (Tr. of R. 70). Vanada Donaby returned to Fairbanks of her own free will and was never in custody, though she did spend some time in jail because of fear (Tr. of R. 68).

ARGUMENT.**I.****NO COMPETENT OR RELEVANT EVIDENCE WAS PROPERLY OFFERED AND REFUSED ADMISSION BY THE TRIAL COURT.**

An analysis of the appellant's first objection, as set forth in his brief on page 2, suggests that his principal argument is premised upon the proposition that two of the Government witnesses had committed a crime against the appellant and had testified against the appellant for some unidentified consideration given to them for such testimony. In fact, no consideration was given or offered to any of the witnesses appearing on behalf of the Government for any testimony given in the case.

Considering first the possible motives for the witnesses giving testimony, the jury was amply apprised of the arrest of William Jones and Nathaniel Wood by the appellant (Tr. of R. 62, 63, 64, 65, 66, 67, 68, 69, 70, 79, 80, 81, 82, 83 and 84). Vanada Donaby, the chief prosecuting witness was never arrested (Tr. of R. 68 and 82.). Appellant has suggested in his brief that it was his attorney's intention during the trial to show that the witnesses, Jones and Wood, had stolen some money from the appellant and such was the principal reason they appear as witnesses against the appellant, intimating that the prosecution or someone had made some deal in terms of dismissal for giving evidence. The court record of the Grand Jury proceedings previous to this trial shows that the matter of the theft above set forth was considered by the

Grand Jury, incidentally the same Grand Jury that indicted the appellant, and that a "No True Bill" was returned. This, as well as other records of the court bearing on this matter, were available to the appellant to be used as he saw fit at the trial. The record shows no concrete evidence, in fact no suggestion of evidence, that any deal was made, or, for that matter, any proposition upon which a deal could be inferred.

Proof of the accusation of appellant that the witnesses committed larceny was inadmissible except for impeachment purposes, which, in turn, would require appropriate foundation, and by the better rule a conviction, as prerequisite. In any event, appellant appears to have premised his objection on a few isolated instances wherein the trial court refused to admit testimony bearing on this proposition for the reason, as the court sets forth, that no foundation had been laid for such offer. As can be shown throughout the entire record, appellant was the party introducing all subject matter concerning which he now complains of limitations in cross-examination preventing exhaustive coverage. Any instance of appellee's participation was only in rebuttal and scant at that. The jury had, even at that, considerable evidence before it concerning the events attending the arrests. That the jury may not have received such evidence in the same light as anticipated by appellant is scarcely a basis for his attempted further pursuit by the testimony of Willa May Walter (Br. 4) with the resulting limitation by the trial court of which he now complains. It could certainly in good conscience have found that the ap-

pellant caused the arrest of Jones and Wood for the purpose of preventing them from spiriting away Vanada Donaby from her bondage in prostitution rather than a finding that some deal was made between Jones, Wood, and the Government, giving them immunity from prosecution for larceny if they testified against Raymond Wright, appellant. Incidentally, the only offered evidence attempting to show the *truth* of the theft, irrelevant as such may be as bearing upon the attitude of the jurors, was offered by defendant's witness, Willa May Walter, an admitted prostitute living at the premises of the "Club 69."

Considering next evidence of prejudice and ill-will of prosecuting witnesses toward appellant as properly bearing on the jury's evaluation of credibility, this likewise is unsupported by the record. As set forth in Transcript of Record, referenced above, the jury had ample evidence of all the propositions tending to show prejudice and ill-will. The only reference made by appellant in his brief (page 4) as to any limitation of evidence was as to whether the witness Jones knew whether two others persons had seen a strong box, and certainly the trial court rightfully sustained an objection on the ground, among others, that no foundation was laid to show that the witness could have possessed such knowledge. Having not seen the strong box himself nor having any knowledge concerning same (Tr. of R. 81), the only conceivable way he could entertain even an opinion would be upon propositions depending for their probative force on the knowledge of others and which for such reasons would

be hearsay. Appellant had every opportunity to offer such evidence through the two parties themselves, both of whom were witnesses and available.

This appellee desires to state that in substance the only limitations complained of by appellant were premised on the offer of evidence by Willa May Walters concerning a conversation with Jones, Wood and Donaby about taking money, and certainly if such were admissible as relevant it could only be so upon proper foundation of which no offer was made, and upon the offer of evidence by the appellant as to when a complaint was sworn to against Jones and Wood, and this without any offer of relevancy or materiality, and if relevant and material, without the available official record. Further, neither limitation, even if adjudged to be without proper basis, could operate to the prejudice of the appellant in any event as evidence of the same subject matter had been previously introduced and stayed uncontradicted throughout the trial to the verdict (Tr. of R. 51, 63).

For authorities bearing upon the above set forth argument, appellee desires to state that the general law and supporting decisions consistently show that as concerns witnesses, such may properly be questioned concerning matters tending to show bias and prejudice towards any of the parties. In qualification of this general rule though, it seems equally well established that the trial judge may properly limit such evidence to the fact itself and may exclude excursions into details.

State v. McCann, 47 Pac. 443:

“The remaining questions were directed to occurrences between the deceased and the defendants, relating to altercations over road matters, and the part that the witness took therein. The objection was properly sustained to these questions. The witness had already testified he was a friend of the deceased, and the court informed counsel for the defendants that he might interrogate the witness as to what feeling he had, friendly or unfriendly, toward the defendants, and *this was all the defendants were entitled to show.*” (Italics ours.)

Also, *State v. Constantine*, 93 Pac. 317:

“The fact that such civil action had been begun was material on the question of the credibility of the witness as it tended to show he had more than the usual interest in the result of the criminal prosecution against the appellant, *but all that was material was proven when the fact itself was admitted by the witness.*” (Italics ours.)

Certainly the records show that the trial court allowed the appellant to far exceed the bounds normally permitted by courts in showing the bias or prejudices, if any existed, of the prosecuting witnesses. Actually, appellant has in his brief confused, in appellee’s opinion, the propositions of bias, prejudice and interest, with impeachment, as the fact of bias, prejudice or interest in the minds of the prosecuting witness, as spelled out in terms of hostility towards the appellant by reason of the latter’s instigating their arrest, the evidence of which fact was thoroughly established and

uncontradicted, is an entirely different thing than impeaching the credibility of the witnesses upon a showing of their criminal conduct, which later proposition can only be sought with a proper foundation and then limited to crimes for which convictions have been had. This weight of authority well establishes the proposition that questions concerning accusation and in all fact all proceedings short of conviction, may properly be excluded by the trial judge. In the case at bar, the witnesses were never even indicted, let alone convicted, of the matter, details of which appellant endeavored to offer as evidence in this trial and now complains of its exclusion. The record shows that the Trial Judge permitted numerable inquiries into this proposition by the appellant, far beyond the tests laid down by the majority rule. Further, the record in its entirety shows that in almost every instance complained of by the appellant, his counsel had improperly raised an issue in cross-examination and following scarcely adequate rebuttal during redirect, pursued the same in even greater detail during recross examination at which latter time the limitation was imposed.

II.

SUFFICIENT CROSS-EXAMINATION OF WITNESSES PRODUCED ON BEHALF OF GOVERNMENT WAS PERMITTED.

The only reference appellant has made in his brief touching the sufficiency of cross-examination permitted, appears to be set forth in the latter part

of his argument wherein he has said "The Court limited the testimony on cross-examination in regard to the larceny of the money by the witnesses, Wood and Jones (Tr. of R. 81, 82). William Jones was permitted to testify over the objection of appellant that he did not steal \$800.00 or any amount, and appellant was refused permission to show that he and Nathaniel Wood had planned to steal the money."

Considering first the latter portion of appellant's statement as to being refused permission to show Wood and Jones planned to steal the money, certainly appellee can find nothing in the record (Tr. of R. 81, 82) or elsewhere, setting forth any offer made by the appellant to prove during cross-examination the matters set forth in his brief. Appellee believes he has sufficiently covered this matter in his arguments bearing on the first complaint. Considering appellant's authorities of which, concerning cross-examination, there is only one, appellee desires to point out that the Government is in full accord with the statement of the Court in that case. Appellant at bar has failed to show wherein full and fair cross-examination on subjects of examination in chief has been denied him. There is no showing in the transcript wherein the subject matter of the "safe" or the money in it was ever raised on examination in chief, nor for that matter is there any place in the entire record wherein any subject matter raised in chief was denied full cross-examination by the appellant; this upon the basis of appellee's search of the record coupled with a con-

clusion that appellant would have referenced in or set forth the contents of any part of the record supporting his conclusion had any existed.

CONCLUSION.

Appellee believes, and therefore urges that appellant has raised these points on appeal principally for delay; that the matters raised in this appeal are completely without basis or merit; that the Trial Court was extremely liberal throughout the entire case in allowing the appellant to raise nearly any issue he so chose with a resultant verdict of guilty with full knowledge of same by the jury.

The appellee respectfully requests, for these reasons and those aforementioned, that the jury verdict and sentence in the case at bar be not disturbed.

Dated, August 6, 1951.

EVERETT W. HEPP,

United States Attorney,

HUBERT A. GILBERT,

Assistant United States Attorney,

Fourth Judicial Division, Territory of Alaska,

Attorneys for Appellee.

Service by receipt of copy of the foregoing brief of appellee is hereby acknowledged, this 27th day of July, 1951.

(Signed) *Julien A. Hurley,*
Attorney for Appellant.

No. 12869

United States
Court of Appeals
for the Ninth Circuit.

RAYMOND WRIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the District Court for the
Territory of Alaska,
Fourth Division

FILED

MAY 23 1951

PAUL H. O'BRIEN,

CLERK

No. 12869

United States
Court of Appeals
for the Ninth Circuit.

RAYMOND WRIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the District Court for the
Territory of Alaska,
Fourth Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

EVERETT W. HEPP,

Fairbanks, Alaska,

Attorney for Plaintiff and Appellee.

QUINCY W. BENTON,

JULIEN A. HURLEY,

Fairbanks, Alaska,

Attorneys for Defendants and Appellants.

In the District Court for the District of Alaska,
Fourth Judicial Division

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAYMOND WRIGHT and VERNESTINE
WRIGHT,

Defendants.

No. 1509 Cr.

INDICTMENT

The Grand Jury charges:

On the 4th day of August, 1950, in the Fourth Judicial Division, Territory of Alaska, Raymond Wright and Vernestine Wright feloniously possessed and had under their control a narcotic drug, to wit, *Cannabis sativa indica*, commonly referred to by the name of "Marihuana," in violation of

Section 40-3-2 of the Alaska Compiled Laws Annotated, 1949.

Dated at Fairbanks, Alaska, this 17th day of October, 1950.

A True Bill

/s/ RAY KOHLER,

Foreman of the Grand Jury.

/s/ EVERETT W. HEPP,

United States Attorney.

Witnesses before the Grand Jury:

Power G. Greer,

Alfred Barber,

Vanada Donaby,

Nathaniel Wood,

William Jones.

[Endorsed]: Filed October 17, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the above-named defendants by their attorney, Quincy Benton, and respectfully move this Court for an order herein dismissing the Indictment for the reason that the same does not state facts sufficient to constitute a crime.

/s/ QUINCY BENTON,

Attorney for Defendants.

Service of copy acknowledged.

[Endorsed]: Filed October 25, 1950.

[Title of District Court and Cause.]

ORDER, PLEA AND SETTING TIME FOR
TRIAL

The Government was represented by Everett W. Hepp, U. S. Attorney; the defendants were present in person and represented by Quincy Benton.

Respective counsel had argument on the defendants' Motion to dismiss the Indictment. It was Ordered that the motion be denied.

This being the time set for the defendants to plead to the Indictment, upon being asked if they were Guilty or Not Guilty of the crime charged in the Indictment, to wit: Illegal Possession of Narcotic Drugs, both defendants pled Not Guilty, which plea was Ordered accepted, and the trial of this cause was set to follow 1507 Cr.

Entered in Court Journal Oct. 25, 1950.

[Title of District Court and Cause.]

PLEA AND SETTING TIME FOR TRIAL

The Government was represented by Everett, U. S. Attorney, the defendants were present in person and represented by Quincy Benton.

The Plea of the defendants to the Indictment as entered on October 25, 1950, being in error, no plea having been made by the defendants, it was Ordered that the Plea be entered forthwith.

Upon being individually asked if they were

Guilty or Not Guilty of the crime charged in the Indictment, to wit: Illegal Possession of Narcotic Drugs, each defendant individually pled Not Guilty, which Plea was accepted and Ordered entered and the trial of this cause was set to follow the trial of Cause No. 1507 Cr., USA v Wright, et al.

Entered in Court Journal Nov. 2, 1950.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 1509 Cr.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

RAYMOND WRIGHT and VERNESTINE
WRIGHT,
Defendants.

VERDICT

We, the Jury, duly empaneled and sworn to try the above-entitled cause, do, from the law and the evidence therein, find

(a) That the defendant, Raymond Wright, is Guilty of the crime of feloniously having in his possession and control a narcotic drug, to wit: marijuana, as set forth in the indictment in this case.

(b) We, the Jury, further find that the defendant, Vernestine Wright, is Guilty of the crime of feloniously having in her possession and under her control a narcotic drug, to wit: marijuana as set forth in the indictment in this case.

Dated at Fairbanks, Alaska, this 11th day of November, 1950.

/s/ EDGAR S. PHILLCO,
Foreman.

Entered in Court Journal Nov. 11, 1950.

[Endorsed]: Filed November 11, 1950.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 1509 Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAYMOND WRIGHT and VERNESTINE
WRIGHT,

Defendants.

JUDGMENT AND COMMITMENT

On the 22nd day of November, 1950, came the United States Attorney, and the defendants, Raymond Wright and Vernestine Wright, appeared in person and by counsel.

It is Adjudged that the defendants have been convicted on a verdict of guilty of the crime charged in the indictment on file herein, to wit, feloniously possessing and having under their control a narcotic drug, to wit, *Cannabis sativa indica*, commonly referred to by the name of "Marihuana," committed in the Fourth Judicial Division, Territory of Alaska, on the 4th day of August, 1950; and the defendants having been asked whether they had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court;

It Is Ordered and Adjudged:

That the defendants are guilty, as charged in said indictment, of the crime of feloniously possessing and having under their control a narcotic drug, and that the defendant, Raymond Wright, shall be confined in the United States Penitentiary at McNeil Island, Washington, for a period of Two (2) years, such sentence to commence on the 22nd day of November, 1950, it being the judgment of the Court that said sentence shall commence at the termination of the Three (3) year sentence imposed on the 22nd day of November, 1950, against the defendant, Raymond Wright, in Criminal Cause No. 1507, entitled "United States of America vs. Raymond Wright," in this Court.

It Is Further Ordered and Adjudged:

That the defendant, Vernestine Wright, shall be confined in the Federal Reformatory for Women at

Alderson, West Virginia, for a period of Two (2) years, such sentence to commence on the 22nd day of November, 1950, and that such sentence is hereby suspended until the further order of this Court, pursuant to the laws of Alaska on the subject.

It Is Ordered that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal, or other qualified officer, and that the same shall serve as the commitment herein, and that said defendants pay the costs of this action, jointly or severally, in the sum of \$31.50, to be taxed by the Clerk of the Court.

Done at Fairbanks, Alaska, this 22nd day of November, 1950.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal Nov. 22, 1950.

[Endorsed]. Filed November 22, 1950.

[Title of District Court and Cause.]

MOTION FOR CHANGE OF VENUE

Comes now the Defendants above-named by their attorneys, Quincy Benton and Julien A. Hurley, and respectfully move the Court for an order herein for a Change of Venue transferring this case to some other Division of the Territory of Alaska for the reason that it is impossible for the said Defend-

ants to get a fair and impartial trial in Fairbanks, Alaska, where practically all of the jurors on the panel from which the jury for the said action must be drawn are residents of the town of Fairbanks, Alaska, or in the near vicinity thereof, and for the further reason that one of the Defendants was convicted and the case dismissed against the other in a former trial which was concluded the day before this trial started, and for the further reason that the said case has been discussed and the said Defendants have been discussed by the people generally in Fairbanks, Alaska, and vicinity, and as shown by the Affidavits hereto attached in support of this Motion it is evident that a fair and impartial trial can not be had in Fairbanks, Alaska.

/s/ QUINCY BENTON,

/s/ JULIEN A. HURLEY,

Attorneys for Defendants.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Robert Hoopes, being duly sworn upon oath, deposes and says:

I am acquainted with Raymond Wright and Vernestine Wright; I know they have been indicted for a criminal offense because I furnished part of

the bond required for their release when they were arrested; I was criticized for furnishing their bond as above mentioned by the present United States Marshal for the Fourth Division, Territory of Alaska; and, I feel that the state of public prejudice is so strong in this community that neither of the above-mentioned defendants can obtain a fair trial in this case.

/s/ ROBERT HOOPES.

Subscribed and sworn to before me this 7th day of November, 1950.

[Seal] /s/ QUINCY BENTON,
Notary Public in and
for Alaska.

My commission expires: 7/16/'52.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Quincy Benton, being duly sworn upon oath, deposes and says:

I am one of the attorneys for Raymond Wright and Vernestine Wright; I have heard so many people discuss the present criminal charge against the above-mentioned defendants that I am convinced they cannot obtain a fair and impartial trial in

Fairbanks, Alaska; I know there is much prejudice against the defendants and I will be able to furnish many affidavits so stating by not later than ten o'clock on the morning of November 8th, 1950.

The knowledge of the existing strong public prejudice was without my knowledge until this date, so, in the interest of fairness and justice to the defendants, and to guarantee them their constitutional rights to a fair and impartial trial, I make this affidavit in their behalf.

I further state that this affidavit is not made for the purpose of delay, but to insure and protect the interests of my clients.

/s/ QUINCY BENTON.

Sworn to and subscribed before me this 7th day of November, 1950.

[Seal] /s/ MARGERY EASTON,
Notary Public in and
for Alaska.

My commission expires: 6/3/52.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 7, 1950.

[Title of District Court and Cause.]

ORDERED THAT MOTION FOR CHANGE
OF VENUE BE DENIED

Came the respective counsel as heretofore including Quincy Benton for the defendants; came the de-

fendants in person; came the entire Panel of the Petit Jury, each person answering to his or her name excepting Bud Meyeres who was excused until November 13, and John Contento, who, for good cause, was excused from the Panel.

The entire Panel was excused from the Court Room.

Mr. Benton and Mr. Hepp presented argument to the Court on the defendants' Motion for a change of Venue.

It was Ordered that the Motion be denied. The Jury was recalled, each person answering to his or her name.

Mr. Hurley continued his examination of those jurors in the Jury Box for cause.

A jury was duly empaneled and sworn consisting of the following persons, to wit:

Dorrine Montgomery, Geo. E. Purser, Wilmer A. Kirsch, Ellen A. Lindeman, Victor Johnson, Essie R. Dale, Gladys B. Joy, Walter B. Steigman, Carrie Korbo, Thomas Paskvan, Jr., Laura Nehrbas, Edward S. Philleo

and those jurors not engaged in the trial of this cause were excused to report again at 10:00 a.m., Thursday, November 9, 1950. .

The Court duly admonished the Jury and the trial of this cause was continued until 10:00 a.m., Wednesday, November 8, 1950.

Entered in Court Journal, Nov. 7, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Raymond Wright, Fairbanks, Alaska.

Julien A. Hurley and Quincy Benton, Attorneys
for defendant.

Offense: Feloniously possessed and had under his control a narcotic drug, to wit, cannabis sativa indica, commonly referred to by the name of "marijuana," in violation of Section 40-3-2, of the A. C. L. A., 1949.

Whereas, Raymond Wright was duly tried and by a jury's verdict convicted of the crime of feloniously possessing and having under his control a narcotic drug, to wit, cannabis sativa indica, commonly referred to by the name of "marijuana," in violation of Section 40-3-2, of the A. C. L. A., 1949, on the 22nd day of November, 1950; and was sentenced by the court to be confined in the United States penitentiary at McNeil Island, Washington, for a period of two years.

The said Raymond Wright, Defendant, is now confined in the Federal jail in the Federal Building at Fairbanks, Alaska.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated this 27th day of November, 1950.

/s/ RAYMOND WRIGHT,
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed November 27, 1950.

[Title of District Court and Cause.]

ORDER FOR RELEASE

Whereas, Raymond Wright was duly tried, and by a jury's verdict, convicted of the crime of feloniously possessing and having under his control a narcotic drug, to wit, cannabis sativa indica, commonly referred to by the name of "marijuana," in violation of Section 40-3-2, of the A. C. L. A., 1949, on the 22nd day of November, 1950; and was sentenced by the court to be confined in the United States penitentiary at McNeil Island, Washington, for a period of two years; and

Whereas, the said Raymond Wright has furnished bail in accordance with the law thereto pertaining,

Now, therefore, you, the United States Marshal for the Fourth Division of the Territory of Alaska, are instructed to release the said above-named defendant pending further orders from the above-mentioned Court.

Done this 27th day of Nov., 1950.

/s/ HARRY E. PRATT,

Judge of the District Court.

Receipt of copy acknowledged.

Entered in Court Journal, Nov. 27th, 1950.

[Endorsed]: Filed November 27, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET TRANSCRIPT

On motion of attorney for the above-named defendant, Raymond Wright, for an order extending the time for filing, recording and docketing the transcript of the above-entitled case on appeal, and it appearing to said Court that by reason of the necessity for the Court Reporter to order supplies for preparing said transcript; said Court Reporter's absence from the jurisdiction of the above-entitled Court; said Court Reporter's time since the filing of the Notice of Appeal having been taken up by his regular trial reporting duties; and the possibility that such condition will continue for some time, it is inadvisable to require the Clerk of this District Court to prepare and deliver said record on appeal within the time heretofore allowed, and said Court being duly advised in the premises and good cause appearing therefor,

It Is Hereby Ordered that the time within which the record on appeal in this case shall be deposited and filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, and said case docketed therein, be and it is hereby enlarged to and including the 130th day following the date of filing the

Notice of Appeal in said above-entitled case; namely: the 25th day of February, 1951.

Dated at Fairbanks, Alaska, this 5th day of January, 1951.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal, Jan. 5, 1951.

[Endorsed]: Filed January 5, 1951.

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To: John B. Hall, Clerk of the above-entitled Court:

You will please prepare transcript of record in the above-entitled cause, to be filed in the Office of the Clerk of the United States Court of Appeals for the Ninth Circuit sitting in San Francisco, California, upon the appeal heretofore perfected at said Court, and include therein the following papers and records, to wit:

1. Indictment.
2. Motion to Dismiss Indictment.
3. Order overruling Motion to Dismiss Indictment.
4. Order, Plea and Setting Time for Trial.
5. Verdict.

6. Judgment and Commitment.

7. All Exhibits as follows: A, B, C, D, E, F, G, and H.

8. Motion for Change of Venue and Affidavits in Support of Motion.

9. Minute Order Overruling Motion for Change of Venue.

10. Notice of Appeal.

11. Order for Release.

12. Order Extending Time to File Record and Docket Transcript.

13. Transcript of Testimony and Trial.

14. Praeceptum for Transcript of Record.

The transcript is to be prepared as required by law and the rules and orders of this Court and the United States Court of Appeals for the Ninth Circuit and should be forwarded to said Court in San Francisco so that the same may be docketed therein on or before the 25th day of February, 1951.

Dated at Fairbanks, Alaska, this 23rd day of February, 1951.

/s/ QUINCY BENTON,

/s/ JULIEN A. HURLEY,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 23, 1951.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 1509 Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAYMOND WRIGHT and VERNESTINE
WRIGHT,

Defendants.

Appearances:

EVERETT W. HEPP,

United States Attorney,

Fairbanks, Alaska,

Attorney for Plaintiff.

QUINCY W. BENTON,

Fairbanks, Alaska,

Attorney for Defendants.

JULIEN A. HURLEY,

Fairbanks, Alaska,

Attorney for Defendants.

Before: Hon. Harry E. Pratt,

District Judge.

PROCEEDINGS

Be It Remembered, that upon the 7th day of November, 1950, at the hour of 10:00 o'clock a.m., the above-named defendants appeared in court in per-

son and represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: This is the time set for trial in case 1509 criminal, United States against Raymond Wright and Vernestine Wright. The District Attorney seems to have disappeared.

(At this point, Mr. Hurley approached the bench and conferred with the court.)

The Court: Veniremen will be excused from the court room until called to return. Remain in the hall of the court room subject to call. That includes the veniremen who qualified this morning.

(The veniremen left the court room.)

Mr. Hurley: If the Court please, at this time I wish to move for a continuance until tomorrow morning at ten o'clock for two reasons. The first reason is that I was not called into this case until just about a day or two before I had to start the trial with the case of United States against John R. Weston and I have been trying cases every since and just completed the trial of a case against these same two defendants. I haven't had the proper time to look into the case and do not feel that [1*] I can do justice to the case if forced to go to trial at this time. The second reason is this, your Honor; that during the trial of this last case against these same defendants, it has been called to the attention of Mr. Quincy Benton and to myself that we probably can't get a fair and impartial trial of this case

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

in Fairbanks for the reason that there is public opinion and prejudice here in the town and it is such that we would be unable to get a fair and impartial trial. We expect to present a motion to the court for that purpose, for the purpose of a change of venue supported by proper affidavits and I believe that we will be able to present a sufficient showing that will entitle us to a change of venue and I would like to have time to present the showing.

We have been—Mr. Benton worked a good part of the night and he expects to be able to contact several people that he hopes to contact to make affidavits to support the showing. We can present the showing this afternoon probably by four o'clock to the court and if it is not allowed, we will be ready to prepare to go to trial in the morning at ten o'clock. If the showing—motion is granted, of course, we will be allowed to have a change of venue to one of the other divisions in the Territory and I believe that the showing will be sufficient to entitle us to the change of venue. It was impossible for us to prepare the showing in time to have it presented this [2] morning.

Mr. Hepp: May it please the Court—

The Court: Mr. Hepp.

Mr. Hepp: I am not going to urge this case on to hearing now. The defendants feel that they will be prejudiced thereby. I feel that they have a right to their day in court under such circumstances that they would be well represented. Mr. Hurley feels that he hasn't had time to prepare this case. I don't

know. Of course, I might state to the court that I haven't had a whole lot of time either but I am not resisting that. I have probably been just as busy as Mr. Hurley if not more so, but I am not going to urge the case for immediate hearing, even though it was set for this morning. Concerning this motion filed, of course I will not be able to reply to that until I see what their showing contains. I might state that it seems quite a sad state of affairs if a person can't be judged by his neighbors and his friends or the fellow citizens of a community, but then, I reserve my showing to be made after I learn the import of their basis for a change of venue.

The Court: There are two attorneys for the defendants in this case. One attorney has been in the case ever since it started. The other attorney has not been in so terribly long—only about a week perhaps. [3] Nevertheless, there are two of them and there is no showing on file in this case as required by law and I don't think that there is any sufficient showing to grant a continuance at this time. Also, I think that the answers of the jury impaneling would go somewhat to show whether or not they can get a fair and impartial jury here. So, the oral motion will be denied.

Mr. Hurley: May it please the court, can I have time to file a written motion?

The Court: Well, there are two attorneys in the case. One can go ahead with the choosing of the jury.

Mr. Hurley: Yes, your Honor, but Mr. Benton isn't here. I would like to get him here and I

would like to file the motion before we start drawing the jury. Mr. Benton is working on it. I will get in touch with him just as soon as possible. Could we have until two o'clock?

The Court: No. I think this is the right time to start choosing the jury. He can prepare the motion and when you have filed it, I will consider it. Go ahead and choose the jury at this time.

Mr. Hurley: Save an exception to the court's ruling.

The Court: Call the jury. [4]

Mr. Hurley: Could I—I don't know how I can get in touch with him this quick.

The Court: Call the jury.

(The veniremen were called back into the court room.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

Clerk of the Court: They are all present, your Honor.

(Whereupon, Mr. Hepp and Mr. Hurley proceeded to examine the jurors until 12 o'clock at which time the court was recessed until 2 o'clock p.m.)

(At 2 o'clock p.m. the trial of this case was resumed.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

Clerk of the Court: They are all present, your Honor.

The Court: Very well. Proceed with the examination of the jury.

Mr. Benton: If your Honor please, I have filed a motion.

The Court: You wish to take up that now? [5]

Mr. Benton: Yes, your Honor.

The Court: Very well.

Mr. Benton: I think that possibly should be taken up outside—— (Interrupted.)

The Court: The jury will be excused to remain in the hallway subject to call.

(The jury left the court room.)

The Court: Mr. Hepp, do you require any time to file an answer to the affidavits?

Mr. Hepp: No, I am not going to ask any time to file an answer. I would like to answer the oral arguments in court.

The Court: I couldn't quite understand the last part.

Mr. Hepp: I say I would like an opportunity to answer in open court the oral arguments of counsel.

The Court: Very well, proceed.

(Mr. Benton presented oral argument to the court in support of a change of venue.)

(Mr. Hepp answered Mr. Benton's argument, resisting the motion.)

(Mr. Benton presented further argument to the court.)

The Court: We have had twelve jurors [6] in the box so far and two of them sat upon the former trial of this defendant and were disqualified, but all of the other ten had no opinion and were perfectly fair and square jurors who felt they could try this defendant impartially. Now, I think that is probably a general average of the rest of the jurors. We have almost 60 jurors in the panel, at least 50, and it seems to me that it is more than likely there will be no trouble at all in getting 12 jurors who are perfectly fair and not influenced by anything they shouldn't be. You could go out and get a number of affidavits. No doubt, Mr. Hepp could get a number of affidavits stating the opinion of people to the contrary and I wouldn't know any more when I got through than I do right now. The fact that these jurors who have been examined on their oath have qualified so largely makes me feel that it is quite a certainty there will be no trouble in getting a jury out of this panel. Therefore, the motion for a continuance is denied.

Mr. Hepp: Your Honor, it is a motion for a change of venue.

The Court: Motion for change of venue is—it is the same thing.

(At this time, the jury returned into the court room.)

The Court: Call the roll of the jury. [7]

(Whereupon, the Clerk of the Court proceeded to call the roll.)

Clerk of the Court: They're all present, your Honor.

(Mr. Hepp and Mr. Hurley completed their examination of the jurors and a jury was duly impaneled and sworn to try the above-entitled case. At 4:50 o'clock p.m., the court duly admonished the jury and the trial of this cause was adjourned until November 8, 1950, at 10 o'clock a.m.)

Be It Remembered, that upon the 8th day of November, 1950, the above-named defendants appeared in court in person with their counsel, the Honorable Harry E. Pratt, District Judge, presiding;

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

Clerk of the Court: They are all present, your Honor.

The Court: Counsel ready to proceed with the trial of this case?

Mr. Hurley: We are ready, your Honor.

Mr. Hepp: Ready.

The Court: Very well. Do you care [8] to make an opening statement?

(Whereupon, Mr. Hepp presented an opening statement to the jury followed by Mr. Hurley.)

The Court: Call your witness.

Mr. Hepp: Call Power G. Greer.

POWER G. GREER

called as a witness in behalf of the government,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Hepp:

Q. Would you state your name to the jury please? A. Power G. Greer.

Q. By whom are you employed, Mr. Greer?

A. United States Treasury Department.

Q. And in what capacity?

A. As a treasury enforcement agent.

Q. How long have you been employed by the United States Treasury?

A. In the United States Treasury Department since 1937.

Q. Where is your station?

A. Anchorage, Alaska.

Q. Would you state what your duties are as a treasury enforcement agent please?

A. As a treasury enforcement agent here in the Territory [9] of Alaska, I have all of the enforcement duties pertaining to all of the enforcement agencies under the Treasury Department, which consists of the Bureau of Narcotics, the Intelligence Unit, the Customs Service, the Alcohol Tax Unit and the Secret Service.

Q. Do you know either of the defendants, Mr. Wright or Vernestine Wright?

A. I know them both.

Q. When did you first learn to know them, Mr. Greer?

(Testimony of Power G. Greer.)

A. I only met—the first time I actually met them was on August 4, 1950.

Q. Are you familiar with the premises in town that is known as the Club 69?

A. Yes, sir.

Q. Have you ever been to those premises, Mr. Greer?

A. Yes, sir.

Q. When did you go to the premises first?

A. On August 4, 1950.

Q. What was the occasion of your going to the premises at that time?

A. To assist Deputy United States Marshal Barber in the execution of a search warrant.

Q. Did you go alone or in the company of any other people, Mr. Greer?

A. In that party, besides Deputy Marshal Barber and myself, [10] was Deputy Marshal Bremer and Deputy Marshal Urie, special agents of the Office of Special Investigation of the United States Air Force, Dennis Stevenson, Siler and Tweedy.

Q. What did you do after you arrived at the premises of the Club 69?

A. We began the search of the premises.

Q. What did you do by way of searching the premises, Mr. Greer?

A. Mr. Barber and I entered the club proper, the Club 69. I went to a rear bedroom in this club and started to search there. At the time that I entered this bedroom, it was dark. Coming out of the

(Testimony of Power G. Greer.)

bright sunlight, there was a very small dim green light burning. I could not determine at that time who, or if any one, was in the room, but I could hear movements of persons.

So, I returned to the car and obtained a flash light, re-entered this bedroom and as I started to go into the bedroom, a young colored soldier came out of the door and he was fastening up his coveralls that he was wearing at the time. With the aid of the flash light, I turned on the large light in the the room and behind a curtained closet was a young colored girl who was nude. She was told to get her clothes on which she did and I told her and the colored boy to go out and sit in the club which they did. [11]

I finished my examination of this room and after I had completed my investigation or examination of this room, someone on the outside called my attention or called me to come out where they were. I went out and assisted some of the other men in the examination of some of the other parts of the premises when Mr. Barber came to the door of the club and called me. I went back into the club and he had a packet in his hand which he showed me. He said, "I found this"— (Interrupted.)

Mr. Hurley: We object to what he told him.

Q. (By Mr. Hepp): Just state what you did, Mr. Greer. A. I asked— (Interrupted.)

Mr. Hurley: I object to what he asked him and any conversation between him and Mr. Barber.

The Court: Objection sustained.

(Testimony of Power G. Greer.)

The Witness: Well, as a result of our conversation, he took me to a part of the club proper which is just inside the bar or the little enclosure that—which is actually part of the club 69 and showed me—— (Interrupted.)

Mr. Hurley: I object to what he told him or showed him.

Mr. Hepp: I believe he can state what he showed him. [12]

The Court: Objection overruled.

Mr. Hurley: Save an exception.

Witness: He showed me on the floor back of a large green chair where this packet was found.

Mr. Hurley: Now, I move that the answer and all that testimony be stricken out as hearsay, what somebody told him.

The Court: Objection overruled, motion denied.

Mr. Hurley: Exception.

Q. (By Mr. Hepp): Just continue with—— (Interrupted.)

A. Shortly thereafter, one of the other men on the outside called my attention and I went out to a small cabin located just to the rear of the Club 69 where Deputy Marshal Bremer showed me a small tobacco tin which at that time was resting on a table in the cabin and I examined the tobacco tin. Mr. Bremer also called my attention to just outside of the cabin in the grass, approximately three or four hundred feet away from the west side of the cabin and—— (Interrupted.)

(Testimony of Power G. Greer.)

Mr. Hurley: I object to what this man showed him and what he found out there in the grass. There has been no foundation laid to show that these defendants had any knowledge of what was out there or anything of that [13] kind; incompetent, irrelevant and immaterial.

Mr. Hepp: I believe that is purely a question of fact for the jury to determine. I believe——
(Interrupted.)

Mr. Hurley: Everything is a question of fact for the jury to determine, but they have got to lay a foundation.

The Court: Well, perhaps you should show on whose premises it was and on what premises.

Mr. Hurley: Who occupied these places out there?

Q. (By Mr. Hepp): Would you state whether or not you have had occasion to observe any container close to the Club 69 and if so, would you state at what position in relation to the Club 69 it was?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial and no proper foundation laid; nothing to show that it has any connection with the defendants whatever.

Mr. Hepp: Your Honor, I think that is—that will be established right on down through this trial. I don't think it is necessary for me to establish that right at this moment.

Mr. Hurley: I do. [14]

(Testimony of Power G. Greer.)

The Court: During the course of your examination, you will show by other witnesses or this witness where these premises are and give a description so we can see if they belong to these people or not?

Mr. Hepp: 'Yes, I will do that right now, your Honor.

The Court: And in whose possession they are.

Mr. Hepp: I believe I can do that right now.

Q. (By Mr. Hepp): Is—were you able to observe, Mr. Greer, any indication of a boundary between the property of the Club 69 that you have testified that you had gone to and any adjoining property?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Witness: I did not observe any boundary, no, sir.

Q. (By Mr. Hepp): Are there any other houses in close proximity or buildings of any kind that appear to be dwelling houses close to the Club 69?

Mr. Hurley: We object to that, if the [15] Court please, as incompetent, irrelevant and immaterial. It isn't a question of whether dwelling houses are near the place.

The Court: Objection overruled.

Witness: The—there is a building located just north of the Club 69 that is in process of being erected. Other than that building and the club proper, there is a small trailer located approxi-

(Testimony of Power G. Greer.)

mately 10 feet to the rear of the Club 69 and just to the rear of the trailer, approximately three or four feet, was a small cabin and just north of this cabin, approximately three or four feet, was a similar cabin. Other than these buildings, there was nothing anywhere near these premises.

Q. (By Mr. Hepp): And of these two buildings that you have referred to, Mr. Greer, is either of them the one which you testified you found this tobacco tin placed—sitting on a table?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial, no proper foundation laid yet as to who occupied it.

The Court: Objection overruled.

Mr. Hurley: Save an exception.

Witness: Yes, sir. The small cabin that is located on the, I would say the southern portion of this property, was the cabin in which I found the tobacco [16] tin.

Q. (By Mr. Hepp): How far away is that from the main structure of the Club 69?

A. Approximately 12, 15 feet.

Q. Twelve, fifteen feet. Now, this other cabin that you have testified concerning to, where is its location in relation to the premises, that is, this principal structure of the premises of the Club 69?

A. That cabin is located almost approximately due west of the main Club 69.

Q. And how many feet between the—— (Interrupted.) A. Same distance, 12, 15 feet.

(Testimony of Power G. Greer.)

Q. Twelve, fifteen feet. Incidentally, Mr. Greer, was anyone present during this search other than these parties that you have named?

A. Yes, sir.

Q. Who was present?

A. There was a white soldier who was sitting in the Club 69 proper when I entered. Two of the other men who were searching the trailer found Mrs. Wright. She was not in the club proper at the time the search commenced.

Q. Did you see her out at that—on the premises of the Club 69 at any time during your search?

A. Yes, sir. Approximately ten minutes after the search [17] began, she came out to the club proper.

Q. Just “yes” or “no,” Mr. Greer, was your attention called to any other containers at the time of this search?

A. Yes, sir.

Q. Just “yes” or “no,” do you know where those containers were located?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial; no proper foundation laid.

Mr. Hepp: I believe, your Honor, that I certainly can establish where they are so that their position can be fixed in the minds of the jury in relation to this property.

The Court: Objection overruled.

Mr. Hurley: Exception.

Witness: Yes, sir.

(Testimony of Power G. Greer.)

Q. (By Mr. Hepp): In relation to the principal structure or either of these two cabins that you have mentioned, what was the distance from that location to the closest building?

A. The three tobacco tins—— (Interrupted.)

Mr. Hurley: Now, I object to that. He didn't ask him about tobacco tins.

Q. (By Mr. Hepp): What was the location of this—that I have previously [8] referred to and which you have testified concerning, how far was that location from any of the buildings that you have named here?

A. Within three or four feet.

Mr. Hurley: What location are you talking about?

Mr. Hepp: I am talking, Mr. Hurley, about the location where his attention was called to some other containers.

Mr. Hurley: I didn't hear that. I object to that and move that the answer be stricken out, incompetent, irrelevant and immaterial. Sounds to me like he is talking about other buildings in the premises. That's the way the question sounded to me.

The Court: Objection overruled.

Mr. Hurley: Exception.

Q. (By Mr. Hepp): You say it was within three or four feet of a building, Mr. Greer?

A. Yes, sir.

Q. Of which building?

(Testimony of Power G. Greer.)

A. Within three or four feet of the southernmost cabin located on these premises.

Q. And that cabin is approximately 12 feet from the principal structure of the Club 69? [19]

A. 12 or 15 feet, yes, sir.

Q. Is there any object appearing as a boundary between this location and the premises of the Club 69? A. Not that I noticed.

Q. Would you state what you saw there please?

Mr. Hurley: Saw where?

Mr. Hepp: At this location.

Mr. Hurley: Well I object to that, if the Court please as too general, incompetent, irrelevant and immaterial.

Mr. Hepp: He certainly can state what he saw there, your Honor.

The Court: Objection overruled.

Mr. Hurley: I don't know what he is talking about.

The Witness: In the grass, approximately three or four feet west of this southernmost cabin, I found three tobacco tins similar to the tobacco tin that I found in the cabin itself.

Q. What did you do with these cans?

A. I examined them.

Q. What did you find in them, Mr. Greer?

A. A residue of a substance.

Q. Do you know what that substance was?

A. In my opinion, yes, sir. [20]

Q. What was it?

(Testimony of Power G. Greer.)

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial; no proper foundation laid, calling for a conclusion and a guess. Nothing to show that these had anything to do with the defendants, no connection whatever. He says he found them out in the grass someplace.

The Court: Objection overruled.

Mr. Hurley: Save an exception.

The Witness: The substance or residue that I found in each of the four tobacco tins contained a very small amount of marihuana.

Q. What did you do with this substance? What did you do with it, if anything, Mr. Greer?

A. It was sealed in a narcotic—in a Bureau of Narcotic sealing envelope.

Q. Did you seal it?

A. Yes, sir. I sealed it myself in the presence of Deputy Marshal Barber. They were later forwarded to the chemist, Mr. Hugo Ringstrom, in Seattle under post-office registry.

Q. Would you state what, if anything, you did with the cans?

A. Yes, sir. They were taken to Anchorage and was stored in my office room which is located in my home. [21] Later on, my young boy got into the cans and destroyed them.

Q. Getting back to this packet that you testified that you observed inside of the premises, do you know what, if anything, happened to that or was done with that? A. Yes, sir.

(Testimony of Power G. Greer.)

Q. What was done, if you know of your own knowledge, Mr. Greer?

A. This packet was put into a similar Bureau of Narcotic sealing envelope.

Q. Who put it in?

A. I did. It was sealed. It was witnessed by Mr. Barber and it was forwarded at the same time to the chemist under the same registry as the other container.

Q. Did you examine the contents of that packet at the time you were out at the premises?

A. Yes, sir.

Q. What did it contain, Mr. Greer?

A. That packet was 16 small home made cigarettes wrapped in brown thin paper, the contents of which was marihuana.

Q. Is marihuana ever referred to by any other name to your knowledge, Mr. Greer?

A. Yes, sir.

Q. By what other name or names?

A. It is referred to commonly as weed, sticks and reefers.

Q. Mr. Greer—just a moment. (To Clerk): Mr. Clerk, [22] would you mark this object for identification please?

Clerk of the Court: Plaintiff's identification number one.

(A brown envelope with post office registry number 2190, addressed to Mr. Hugo Ringstrom, was received and marked Plaintiff's identification 1.)

(Testimony of Power G. Greer.)

Q. (By Mr. Hepp): Mr. Greer, I show you plaintiff's identification number one which appears to be a brown envelope containing stamps and writing. I ask you to examine it if you will please. (Handed document to witness.) State if you know what it is, please. A. Yes, sir; I do.

Q. What is it, please?

A. This is the envelope in which I placed the two narcotic sealed envelopes containing the packet of 16 marihuana cigarettes and the residue of marihuana that I removed from the four tobacco tins.

Q. What did you do after you placed those articles in that envelope?

A. It was sealed and addressed.

Q. Who sealed it? A. I did, sir.

Q. What did you do next?

A. I addressed it. [23]

Q. To whom did you address it?

A. To Mr. Hugo Ringstrom, chemist in charge, Alcohol Tax Unit, 210 Federal Building, Seattle, Washington.

Q. What did you do then with it?

A. Up in the left hand corner, I placed my return address, post office box 963, Anchorage, Alaska.

Q. And then what did you do?

A. I took it to the post office where I had it registered under post office register 91—2190 and placed it in the United States mail.

Q. Did you place any stamps on it?

A. Yes, sir.

(Testimony of Power G. Greer.)

Mr. Hepp: Mr. Clerk, would you mark this article for identification?

Clerk of the Court: Plaintiff's identification number two.

(A small brown envelope labeled "Treasury Department, Bureau of Narcotics," was received and marked for identification as Plaintiff's identification number 2.)

Q. (By Mr. Hepp): Mr. Greer, I show you government's identification number two appearing to be a brown envelope with sealers and the words "marihuana residue" appearing thereon. I ask you to examine it and state—just examine it please. (Handed envelope to witness.) State if you know what it is, [24] please? A. Yes, sir.

Q. What is it?

A. It is a Treasury Department, Bureau of Narcotics form number 150 which is a brown envelope with sealers.

Q. Have you ever seen that envelope before?

A. Yes, sir.

Q. When did you see it, Mr. Greer?

A. The last time was on August the 5th or 6th, 1950.

Q. Did you do any act concerning that envelope at that time, Mr. Greer? A. Yes, sir .

Q. Would you state what you did, please?

A. On August 5th, the day after this search was made, I placed in this envelope the residue of marihuana that was—that I scraped from the four to-

(Testimony of Power G. Greer.)

bacco tins. That was seized the day prior. This envelope was sealed on August 5, 1950, in the presence of Al Barber, Deputy United States Marshal.

Q. What did you do with it then?

A. I kept it in my possession until I returned to Anchorage which was on the same day. As I recall, on the following Monday, the 7th of August, this, along with a similar envelope, was placed in the large addressed envelope addressed to the chemist in Seattle. [25]

Q. Is that the envelope which is labeled government's identification number one that you just examined?

A. Yes, sir.

Q. And you posted that, did you? You placed that in your envelope, did you?

A. Yes, sir.

Q. And it was sent, was it, with this envelope that you have previously testified about?

A. Yes, sir.

Clerk of the Court: Government's identification number three.

(A small brown envelope labeled "Treasury Department, Bureau of Narcotics," was received and marked government's identification number three.)

Q. (By Mr. Hepp): Mr. Greer, I show you government's identification number three, appearing to be a brown envelope with sealers and writing including the words "16 marihuana cigarettes."

(Testimony of Power G. Greer.)

Would you examine it please (handed to witness) and state if you know what it is please?

A. Yes, sir. It is a Treasury Department, Bureau of Narcotics form, number 150 which is a brown envelope which has sealers on it. On the reverse of which I, myself, wrote "16 marihuana cigarettes," sealed 8-5-50.

Q. When did you see this—you state that you wrote those [26] words on that envelope?

A. Yes, sir.

Q. When did you see that envelope last, sir?

A. My best recollection it was the following Monday which was on August 7th.

Q. What did you do with the envelope?

A. I placed it along with the other similar envelope into the larger brown envelope in Anchorage. I addressed it to the Chemist in Charge, under post office registry and it was sent to the chemist.

Q. Did this envelope, being government's identification number three, contain anything in it when you—at the time when you sealed it into the large envelope?

A. Yes, sir.

Q. What did it contain, Mr. Greer?

A. 16 marihuana cigarettes.

Q. Who placed those articles in that envelope?

A. I did.

Q. Where had you obtained those articles that you placed in that envelope?

A. I obtained them from the Club 69.

Q. Are they the articles—— (Interrupted.)

(Testimony of Power G. Greer.)

Mr. Hurley: Now we move that the answer be stricken out, incompetent, irrelevant and immaterial. It doesn't conform to his testimony or anything else. He [27] said he never saw those cigarettes until somebody showed it to him and now he says he obtained them at the Club 69 and there is nothing—— (Interrupted.)

Mr. Hepp: Your Honor—— (Interrupted.)

The Court: Motion denied.

Q. (By Mr. Hepp): Would you answer the question, please?

A. Yes, sir. I obtained them at the Club 69.

Q. Are they the articles that you previously testified as having been—had them handed to you in the premises of the Club 69? A. Yes, sir.

Q. Are they in the same condition now as they were when you saw them last, Mr. Greer?

Mr. Hurley: What are you talking about now?

Mr. Hepp: The articles that are in this government's identification—— (Interrupted.)

Mr. Hurley: I object to that. He hasn't said anything about the articles that were in there, your Honor.

Mr. Hepp: I believe he did.

Mr. Hurley: I don't see how he can say they're in the same condition or not. He doesn't show he is qualified to answer the question. They haven't shown [28] them or where they are or anything about them.

Mr. Hepp: I believe he testified that there were

(Testimony of Power G. Greer.)

16 articles in that that he had placed them——
(Interrupted.)

Mr. Hurley: Yes and—— (Interrupted.)

Mr. Hepp (Continuing): ——in the envelope
—— (Interrupted.)

Mr. Hurley (Continuing): ——mailed them to
somebody. Now he wants to know if they are in the
same condition now.

Q. (By Mr. Hepp): Mr. Greer, is there any-
thing in that envelope, government's identification
number three? A. Yes, sir.

Q. What do you see in that envelope?

A. Some cigarettes wrapped in brown thin
paper.

Q. How many of them are there? A. 16.

Q. Have you ever seen those objects before, Mr.
Greer? A. Yes, sir.

Q. Where did you see them?

A. First time was on August 4th, 1950.

Q. Where did you see them?

A. At the Club 69.

Q. Are they in the same condition as they were
when you [29] saw them?

A. Apparently so.

Q. You can see no change, no difference, is that
right, Mr. Greer? A. No, sir, I can not.

Q. Was either of the defendants present when—
at any time—when you had possession of those
narcotic—those cigarettes out at the Club 69?

A. Vernestine Wright was present.

(Testimony of Power G. Greer.)

Q. She saw that you had them, did she?

A. Yes, sir.

Q. Did she make any statement concerning it at the time, Mr. Greer?

A. Yes, sir.

Q. Who was present at that time?

A. I am not sure whether all of the officers were in the club at the time or not. Most of them were and besides the officers, the white soldier, the colored soldier and the colored girl that were in the bedroom.

Q. What did she say in regard to that?

A. She stated she did not know anything about them, didn't know anything about marihuana, that she never smoked marihuana and had never used it in any way.

Q. Did you see Raymond Wright at the premises at the time that you have testified? [30]

A. No, sir.

Q. Did Mrs. Wright make any statement to you about his whereabouts?

A. No, sir. I asked her where he was and she said he was out somewhere. I don't recall if she told me where he was.

Q. She said he was out somewhere?

A. Yes.

Mr. Hepp: You may question the witness.

Mr. Hurley: I wonder if we can have about a ten minutes recess, your Honor. I would like to look at this exhibit before I cross-examine.

The Court: Yes, take a ten minute recess.

(Testimony of Power G. Greer.)

(Whereupon, the court recessed for ten minutes and then reconvened.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court called the roll.)

Clerk of the Court: They are all present, your Honor.

The Court: Very well. Counsel ready to proceed?

Mr. Hurley: Yes, your Honor. [31]

Mr. Hepp: Ready.

Cross-Examination

By Mr. Hurley:

Q. Mr. Greer, how long have you been employed by the government? A. Since 1931, sir.

Q. And in what capacity?

A. I started in 1931 as a prohibition agent in the Department of Justice.

Q. I see. And you say you went out with the search warrant on the 4th of August, was that right, of this year, Mr. Greer? A. Yes, sir.

Q. And what time did you go out there?

A. Approximately one o'clock, one-thirty in the afternoon.

Q. You say between one or one-thirty or little after one, is that right?

A. I believe we left the Marshal's office around one or little after.

(Testimony of Power G. Greer.)

Q. And I think you said you found a can—a tobacco can out there?

A. Yes, sir. It was called to my attention and I picked them up.

Q. Oh, you didn't find them?

A. Yes, sir; I found them. They were—— (Interrupted.) [32]

Q. I say, did you find the tobacco can or did somebody else find them?

A. They had been previously found.

Q. Oh! I thought you said you went into a room where there was a colored boy and a colored girl and found a tobacco can, Mr. Greer?

A. No, sir, I didn't say—— (Interrupted.)

Q. You didn't find anything yourself?

Mr. Hepp: Now, I object to that, your Honor unless he specifies what incident he is—— (Interrupted.)

Q. (By Mr. Hurley): I say, while you were out there, you didn't find anything yourself?

A. No, sir; not until after it was called to my attention.

Q. I say you didn't find anything yourself?

A. No, sir, I didn't find—— (Interrupted.)

Q. All right. Somebody told you that they had found something, did they? A. Yes, sir.

Q. I see. And somebody told you they found a can in some room, did they?

A. They told me they found a can in a room and when my attention was called to it, it was in the cabin on the premises.

(Testimony of Power G. Greer.)

Q. In the room or where? [33]

A. It was in the room of the cabin, on the premises.

Q. It was—in the room of a cabin?

A. Yes, sir.

Q. Did you find any can in the 69 Club?

A. No, sir.

Q. Was your attention called to any can in the 69 Club, Mr. Greer?

A. No, sir.

Q. Then somebody found how many cans out in the grass or outdoors someplace?

A. Three.

Q. And you didn't see them find them?

A. No, I didn't see them find it.

Q. Where were you when your attention was called to those three cans?

A. I was in the Club 69.

Q. Oh, I see. And then all the contents of the four cans were taken out, were they?

A. Yes, sir. I removed them myself.

Q. What?

A. Yes, sir; I removed them myself.

Q. And you put them all in one package?

A. Yes, sir.

Q. And you say that after you had scraped them all out, you had found some marihuana in the package that you had [34] scraped out with the four cans?

A. No, sir. When I examined them, I found residue of marihuana in the bottom of each.

Q. In each?

(Testimony of Power G. Greer.)

A. Yes, sir, and—— (Interrupted.)

Q. But you put them all together?

A. Yes, sir. I scraped the residue all out and put it all together.

Q. What does marihuana look like?

A. Well, it's—it looks like—it looks something like green rabbit tobacco.

Q. What? Green rabbit tobacco?

A. Green rabbit tobacco.

Q. Green rabbit tobacco? A. Yes, sir.

Q. I never heard of that. And you sealed that up and mailed it out? A. Sir?

Q. I say you sealed that up in a package and mailed it outside someplace? A. Yes, sir.

Q. And then you lost the cans?

A. No, sir; I didn't lose the cans. I kept custody of them, Mr. Hurley, in my office as I stated, which is in my home and while I was on a trip, my six year old boy got [35] hold of them and took his mother's scissors and took them all apart.

Q. Cut the cans up? A. Yes, sir.

Q. With scissors? A. Yes, sir.

Q. And what kind of tobacco cans were these?

A. There were three of them that were Velvet as I recall and one was a Prince Albert can.

Q. So, you don't have the cans anymore?

A. No, sir.

Q. And what does marihuana come in ordinarily? Is it usually in cigarettes?

A. That is the way it is consumed.

(Testimony of Power G. Greer.)

Q. I see. And did you find any cigarettes or was your attention called to them?

A. My attention was called to that.

Q. So, you don't know anything about where any was found out there?

A. Of my own knowledge?

Q. Yes.

A. No—of my own knowledge. Except where I found—except where the tobacco tins were placed when I found them, I picked them up.

Q. How did you come—how do you mean “placed” when you [36] picked them up?

A. The first tobacco tin was placed on a table inside the small southernmost cabin.

Q. Who by?

A. I don't know, sir. It was there when I found it.

Q. I thought you said somebody showed you the cans, Mr. Greer?

A. They did.

Q. Well, was you showed this can in a cabin or was the can shown to you there in the Club 69?

A. I was shown this can in the cabin. I was in the 69 Club when Deputy Marshal Bremer came into the club and said, “Come here. I want to show you something.” I went there into the cabin with him and he said, “There is a tobacco tin. Look in the bottom of it.” I did so. After that he told me—he took me out to the back of the western part of the cabin and he said, “Here are three more.”

Q. Didn't you say a little while ago that you

(Testimony of Power G. Greer.)

didn't find anything and you saw—they brought them in to you? A. No, sir.

Q. You didn't? A. No, sir.

Q. And who went with you when you went out and saw these cans outdoors?

A. Deputy Marshal Bremer. [37]

Q. And they were just empty tobacco cans laying out there, were they?

A. Practically empty, yes, sir.

Q. Looked like just empty tobacco cans?

A. Yes, sir.

Q. So they called you out to look at them?

A. Yes, sir.

Q. They called you into this room, this little house outside of the 69 Club to look at a can?

A. Yes, sir. That is where my attention was invited at first.

Q. And that is where you saw a colored boy and a colored girl? A. No, sir.

Q. It wasn't? A. No, sir.

Q. You didn't find a can where there was a colored boy and a colored girl?

A. No, sir; not in the same building.

Q. Oh! Was there anybody in this cabin when you went out there? A. No, sir.

Q. Do you know who occupied that cabin last?

A. No, sir.

Q. What? [38] A. No, sir.

Q. And you don't know anything about how those cans got outdoors there in the grass, do you?

(Testimony of Power G. Greer.)

A. No, sir.

Q. And then you say somebody showed you 16 cigarettes in the 69 Club?

A. Yes, sir. The cigarettes were shown to me before the tobacco cans were found.

Q. And who showed you the 16 cigarettes?

A. Deputy Marshal Barber.

Q. And those were the ones that you have identified as having sent outside, is that right?

A. Yes, sir.

Q. What did you send them outside for?

A. For chemical analysis.

Q. Why?

A. That happens to be a regulation that we have to obey, Mr. Hurley.

Q. I see. They don't trust you to know marihuana when you see it?

Mr. Hepp: I object to that, your Honor. I don't think these kind of comments are proper here at this trial.

The Court: Objection overruled. [39]

Q. (By Mr. Hurley): I say they don't trust you to identify marihuana?

A. No, sir, not when we have a chemist to do it.

Q. But you know it when you see it?

A. In my opinion, I do; yes, sir.

Q. Well, you testified it was marihuana.

A. I testified in my opinion it was marihuana.

Q. Oh! You did? A. Yes, sir.

Q. I thought you said it was marihuana ciga-

(Testimony of Power G. Greer.)

rettes right along, all the time. You never smoked any of them, did you? A. No, sir.

Q. Do you know what the effect of it is?

A. Yes, sir. I have seen the effect of it and I have read something about the effect of them.

Q. Do you know how much they sell for?

A. It varies.

Q. Well, do you know how much?

A. Yes, sir. In the States, they are probably—they probably sell for around a dollar a cigarette, although that varies in different localities. In Anchorage, they sell for around two dollars.

Q. Do they manufacture them?

A. In what way sir?

Q. Well, like manufacturing cigarettes.

A. By some company? [40]

Q. You know some people roll cigarettes and some people smoke them that are already rolled and I wondered if the marihuana cigarettes are used both ways.

A. Not that I know of, sir.

Q. Not that you know of? A. No, sir.

Q. What?

A. All that I have ever seen were hand made or hand rolled, just like those.

Q. Hand rolled? A. Yes, sir.

Q. Anybody can roll them that has marihuana and a piece of paper? A. I assume.

Q. What? A. I assume they could.

Q. And you say these are just in the same condition now as they were when you took them?

(Testimony of Power G. Greer.)

A. To the best of my knowledge, yes, sir. They are—I will have to qualify that to some extent. Some of the marihuana has spilled out of some of them and they are not as fully packed as they were.

Q. How long had you been here before you went out on that search?

A. Here in Fairbanks? [41]

Q. Yeah.

A. At that time, I either arrived in Fairbanks on Thursday or—Wednesday or Thursday of that week and this search was made on a Friday.

Q. On a Friday? A. Yes, sir.

Q. Did you come up to make the search?

A. No, sir.

Q. What did you come up for?

A. For other investigation pertaining to the United States Government.

Q. What kind of an investigation were you making?

Mr. Hepp: I object to that, your Honor. I don't think that it is proper here at this trial. That may be a confidential matter.

The Court: Objection sustained.

Q. (By Mr. Hurley): You just happened to be here when this search was made, is that right?

A. Yes, sir.

Q. Did you see the search warrant that you went out under, Mr. Greer? A. Yes, sir.

Q. Do you know who signed it?

A. The United States Commissioner signed it.

(Testimony of Power G. Greer.)

Q. Do you know who made the affidavit for the search warrant?

A. I am not sure that I do, sir.

Q. You're not sure? A. No, sir.

Q. Were you here when the affidavit was made?

A. I wasn't present when—— (Interrupted.)

Q. I say, were you here in town when the affidavit was made? A. I am not sure about that.

Q. You're not?

A. I don't know just when the affidavit was made, sir.

Q. All you saw was the search warrant?

A. Yes, sir.

Q. You didn't look at the affidavit?

Mr. Hepp: I object. He has covered that matter thoroughly, your Honor. He's just trying to drive home an immaterial point that I should have objected to right at the first.

The Court: Objection overruled.

Mr. Hurley: It is quite important.

Q. (By Mr. Hurley): You didn't look at the affidavit?

A. I don't recall that I did. I may have but if I did, I don't recall who it was that made the affidavit. [43]

Q. You don't remember that? A. No, sir.

Mr. Hurley: I think that's all.

Mr. Hepp: Just a minute.

(Testimony of Power G. Greer.)

Redirect Examination

By Mr. Hepp:

Q. I believe you testified, Mr. Greer, in response to Mr. Hurley's question that you didn't find—to use his words—you didn't find these three cans that were out in the brush or bushes or wherever you found them or wherever they were found.

A. I did not actually find them. I was in the—I was not the first person who found them.

Q. Where were the three cans when you first saw them?

A. They were lying in the grass right close together, oh, maybe a foot or two apart and within three or four feet of the west part of this small cabin.

Q. Did the immediate area around these cans appear to have been recently disturbed?

A. I couldn't hardly say. I don't remember.

Q. Oh, incidentally. I believe you testified that in your opinion this was marihuana?

A. Yes, sir.

Q. That was in response to Mr. Hurley's question, was it, [44] Mr. Greer? A. Yes, sir.

Q. Do you know what coffee is, Mr. Greer?

A. Yes, sir.

Q. Is that an opinion, too? A. Yes, sir.

Mr. Hepp: That's all.

Mr. Hurley: That's all.

(Mr. Greer left the witness stand.)

Mr. Hepp: Call Al Barber, please.

ALFRED BARBER,

called as a witness in behalf of the government, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hepp:

Q. Would you state your name, please?

A. Alfred Barber.

Q. By whom are you employed?

A. United States Department of Justice.

Q. In what capacity, Mr.—— (Interrupted.)

A. As a United States Deputy Marshal.

Q. Where is your station?

A. Fourth Division.

Q. Where is your office, please?

A. Fairbanks. [45]

Q. How long have you been employed by the Department of Justice?

A. Since February 28, 1950.

Q. Do you know either of the defendants, Raymond Wright or Vernestine Wright?

A. I do.

Q. Do you know both of them?

A. Yes, I do.

Q. How long have you known Raymond Wright?

A. Since March, 1950—March the 3rd, 1950.

Q. And how long have you known Vernestine Wright?

A. Oh, I would say about April or May. I am not sure.

Q. Do you know where they were living at that time? A. Yes.

(Testimony of Alfred Barber.)

Q. Where were they living?

A. At the Cotton Club.

Q. Where is that?

A. That's on South—South Fairbanks.

Q. Did you know—did you have occasion to see either of them during the first of August or around the first of August of this year, Mr. Barber?

A. I did.

Q. Do you know where they were living then?

A. At the Club 69.

Q. Do you know how long they had been living at the Club [46] 69 at that time?

A. No, I don't.

Q. Had you seen them at the Club 69 previous to August, Mr. Barber?

A. Yes, I had.

Q. Did you have occasion to go—do you know the premises of the Club 69?

A. Yes, I do.

Q. Did you have occasion to go to these premises on the 4th of August of this year?

A. Yes.

Q. What was the circumstances attending your going to the Club 69 on that date?

A. Well, I received an Alaska Territorial search warrant from the United States Commissioner and approximately one thirty, I went to the Club 69 to execute it.

Q. What did this search warrant direct you to do, if anything?

A. Well, to search the premises for marihuana.

Q. Did you go to the premises?

A. Yes, I did.

(Testimony of Alfred Barber.)

Q. Is that the premises of—which premises did you go to, Mr. Barber?

A. The Club 69 including the silver colored trailer and the white house. [47]

Q. What did you do after you arrived there?

A. I read the search warrant to Vernestine Wright.

Q. What did you do then?

A. Then, Mr. Greer and myself went in the Club 69 proper and started to search the building.

Q. What did you find, if anything, there, Mr. Barber?

A. I found 16 cigarettes wrapped in brown paper, wrapped individually in brown paper, bound together by a rubber band behind a large chair on the floor, about two inches from the south wall of the building.

Q. You say they were behind a chair?

A. Yes, a large chair.

Q. Was that on—is that an upholstered chair?

A. Yes, an upholstered chair.

Q. Would you state where—no. First, state if you can, Mr. Barber, what the premises of the building of the Club 69 looks like in relation to partitions of rooms and things like that.

A. Well, when you walk in the building—
(Interrupted.)

Q. Where is the door? A. Yes, the door.

Q. Where? Where in the building in relation to north, west or south?

(Testimony of Alfred Barber.)

A. Well, standing in the entrance of the building looking straight ahead, it would be north and to the left would be [48] west. There were two rooms and to the east there was a shower—a room which was a shower and sink—and there was a sort of an arched partition there and they had a bar and refrigeridaire and this large chair and there was also a sofa on the south wall.

Q. Where in relation to this shower and sink and bar that you have testified, was this chair that you have mentioned, Mr. Barber?

A. About two feet away from the bar.

Q. When did you first see these cigarettes wrapped in brown paper that you have testified concerning?

A. Well, I—I just got through searching the bar and around that area and I noticed a, oh, a package between the chair and the wall, the south wall. So, I said, “Well, boys, it looks like we’ve found something here,” and Deputy Marshal Urie and Arthur Bremer looked up and I pulled the chair over and there the cigarettes were laying. I picked up the cigarettes for identification and the witness—Martin Urie and Arthur Bremer witnessed the finding of the cigarettes and I called Howard Greer—Power Greer and he looked at the cigarettes and he says in his opinion it was marihuana.

Mr. Hurley: Well, we move that that be stricken out.

Mr. Hepp: That’s alright. May be stricken. [49]

The Court: May be stricken.

(Testimony of Alfred Barber.)

Q. (By Mr. Hepp): Do you know where Mrs. Wright was at the time when you first saw the cigarettes?

A. She was in the building. She was in the Club 69 proper at the time of the search.

Q. Was she in your sight at the time?

A. Oh, yes. She said—— (Interrupted.)

Mr. Hurley: Now, we object to that—— (Interrupted.)

Mr. Hepp: Just a minute.

Mr. Hurley: Just answer the questions.

Witness: I said she was in the building.

Mr. Hurley: I say, answer the questions, don't volunteer.

The Court: Wait until he asks another question.

Q. (By Mr. Hepp): Were these cigarettes that you stated you found in any kind of a container or wrapping or other device?

A. No. They were just wrapped individually in brown paper and the—bound together by a rubber band on the floor.

Q. You say you picked them up?

A. Yes, I did. [50]

Q. Had you ever seen those cigarettes before you saw them there on the floor? A. No.

Q. What did you do with the cigarettes after you picked them up?

A. I gave them to Power Greer who was the Treasury Agent.

Q. Did you do anything else with them?

(Testimony of Alfred Barber.)

A. Yes. I put my initials on the cigarettes, each and every one of the cigarettes, the 16.

Q. I show you government's identification number three, being this envelope and ask you to examine the contents of this envelope including these articles that have—that are—that appear here on this desk. (Pause.) State if you know what they are, please.

A. They look like the cigarettes that I picked up.

Q. Do you have any way of knowing whether — (Interrupted.)

A. Oh, yes. I marked each one of them. I would have to look at each cigarette.

Q. Well, examine a few of them.

A. (Pause.) Yes. Here is one with my initial on it.

Q. Have you seen that article before, Mr. Barber? A. Yes, I have.

Q. Where did you see it first?

A. In the Club 69 proper.

Q. Is that one of the 16 articles—16 cigarettes that [51] you testified concerning?

A. Yes, it is. I put my initial on with indelible pencil, sir.

Q. Is that in the same condition as it was when you first saw it? A. No.

Q. The one that you first—this other one that you said had your initial, is that in the same condition as when you first saw it? A. No, it isn't.

Q. In what respects is it different?

(Testimony of Alfred Barber.)

A. Well, the edges are crimped up and everything. It looks like it has been opened. It looks like it has been crimped up and closed shut.

Q. Is it different in any other respect?

A. No.

Q. Will you examine one or two more of them?

A. Yeah.

Q. (Pause.) Are you able to state now whether or not you have seen those articles before? Other than the first one that you have testified, are you able to state whether or not you have seen those other ones before? A. Yes, I have.

Q. Where did you see them?

A. Behind the large chair on the floor of the Club 69 [52] proper.

Q. Did you say Mrs. Wright was—one of the defendants—also present at the time when you first saw these?

A. Yes. Mrs. Wright was present at the time.

Q. Just “yes” or “no,” did she make any statement concerning it one way or the other? Just “yes” or “no”? A. No.

Q. At any time while you were out at the premises of the Club 69 on this date, August the 4th, did you hear Mrs. Wright make any statement concerning this matter? A. Yes, I did.

Q. Who was present in the—when that statement was made, Mr. Barber?

A. Deputy Marshals Martin Urie and Arthur Bremer and the OSI agent, Mr. Siler. They were present but I don't know if they heard.

(Testimony of Alfred Barber.)

Q. And Mrs. Wright was there, of course?

A. Oh, yes.

Q. And you were there? A. Yes.

Q. What did she say in regard to this matter?

A. She says, "What's that?" And I says, "Don't you know?" And she says, "No, I don't." I said, "Do you smoke?" She says, "Yes, I do." I said, "Do you want to smoke one of these?" She says, "No, thanks." [53]

Mr. Hepp: Mr. Clerk, would you mark these papers respectively?

Clerk of the Court: Government's identification number four, government's identification number five, government's identification number six, government's identification number seven and government's identification number eight.

(A photograph, showing a chair, was received and marked government's identification number four.)

(A photograph, showing a chair, was received and marked government's identification number five.)

(A photograph, showing a chair and portion of a floor, was received and marked government's identification number six.)

(A photograph, showing a portion of a floor and an overturned chair, was received and marked government's identification number seven.)

(Testimony of Alfred Barber.)

(A photograph, showing a floor, was received and marked government's identification number eight.)

Q. (By Mr. Hepp): Mr. Barber, I show you government's identification number four which purports to be a picture of the interior of a building containing a chair and ask you to examine it, please? (Handed to witness.) State if you know what it is, please? [54]

A. Yes. This is the chair in the Club 69 proper that I found the cigarettes behind.

Q. Is that photograph—does that photograph faithfully represent the scene that it purports to as you viewed it when you were there?

A. Oh, yes, sir, it does. This chair is near the bar. The bar is over here. It is not in the picture, though.

Q. I show you government's identification number five purporting to be a photograph of the same building, a little different view. Would you state what it is?

A. Yes. This is the same chair that I found the cigarettes behind and this is the chair and next to this lamp would be the bar.

Q. Does that photograph faithfully represent the articles and subject matter that it purports to as you viewed it when you were there at the Club 69?

A. I would say so, yeah.

Q. And this chair that you are referring to, where is it again for the record?

(Testimony of Alfred Barber.)

A. Well, it is in the small enclosure—— (Interrupted.)

Q. In what premises, please?

A. In the Club 69 proper.

Q. I show you identification number six, purporting to be a photograph of an interior of a room. State if you know what that is, please? [55]

A. Yes. This is the chair and this is the south wall. That would be looking at it this way and that is the cigarettes there.

Q. Does that photograph faithfully represent the subject matter that it purports to as you viewed that subject matter when you were at the Club 69?

A. Yes, it is.

Q. I show you government's identification number seven, being a photograph of an interior of a room and ask you to examine it, please. (Pause.) Would you state, if you know, what it is?

A. Yes. This is the room and this is the chair that I pulled over when I said, "Well, it looks like we found some cigarettes." The cigarettes are laying here.

Q. Does that photograph faithfully represent the subject matter that it purports to as you viewed it when you were there? A. It does, yes.

Q. And I show you government's identification number eight, purporting—being a photograph and purporting to show the interior of a room. Would you state if you know what it is?

A. (Pause.) Yes. Those are the cigarettes laying against the wall there.

(Testimony of Alfred Barber.)

Q. Does that faithfully represent the subject matter that [56] it purports to as you viewed that subject matter yourself at the time you were at the Club 69? A. Yes.

Q. And all this occurred on this August 4th, did it, Mr. Barber?

A. Yes, August 4th about an hour after we were there.

Q. Of this year? A. Of this year, yes, sir.

Q. While you were at the premises of the Club 69, was your attention called to anything else, Mr. Barber? A. No, it wasn't.

Q. Did you see Mr. Wright around the premises at that time? A. No, I did not.

Q. Did Mrs. Wright make any statement to you concerning his whereabouts? A. Yes, she did.

Q. What did she say in that regard?

A. She said that he wasn't there then. She didn't know where he was.

Q. He wasn't there then?

A. Yes, at that time.

Q. Do you know who operates the Club 69—who was operating—excuse me. I withdraw that question. Do you know who was operating the Club 69 as of August 4th of 1950, Mr. [57] Barber?

A. Yes, I do.

Q. Who was operating it?

A. Vernestine Wright.

Q. Do you know who lived there at the time?

A. Vernestine Wright and Raymond Wright.

Q. Do you know who owns the Club 69?

(Testimony of Alfred Barber.)

A. Vernestine Wright.

Mr. Hurley: I move that be stricken out and ask that he answer the question instead of volunteering information. He asked him if he knew who owned it. He didn't say whether he knew or not.

The Court: Alright, objection sustained.

Q. (By Mr. Hepp): Just "yes" or "no," Mr. Barber, do you know who owns the Club 69?

A. Yes, I do.

Q. Who owns it?

Mr. Hurley: We object to that for the reason that no proper foundation has been laid. It is leading. Doesn't—— (Interrupted.)

Mr. Hepp: Your Honor—— (Interrupted.)

Mr. Hurley: No evidence that he knows, how he knows or anything else.

The Court: Objection sustained. [58]

Q. (By Mr. Hepp): Mr. Barber, had you ever seen marihuana before you saw these articles out in the Club 69? A. No, I have not.

Q. Did you ever smoke any? A. No, sir.

Mr. Hepp: That's all. You may question the witness.

Cross-Examination

Q. (By Mr. Hurley): How long have you been a Deputy Marshal?

A. Since February 28, 1950.

Q. Oh, I see. And you had a search warrant when you went out there? A. Yes, I did.

Q. And do you know who signed the affidavit upon which the search warrant was issued?

(Testimony of Alfred Barber.)

A. No, I do not.

Q. You don't? A. No.

Q. You don't know anything about that?

A. No.

Q. Well, do you know who did get the affidavit made or anything about that? [59]

A. What affidavit are you talking about?

Q. The affidavit for the search warrant. A search warrant can't be issued without an affidavit. Didn't you know that? A. Yes, I knew that.

Q. Well, who made the affidavit in this case?

A. Well, I signed a complaint.

Q. I say, who made the affidavit for the search warrant? A. I don't know, Mr. Hurley.

Q. You don't know? A. No, I don't.

Q. And no information in the Marshal's office about that? A. I—— (Interrupted.)

Mr. Hepp: I object to that, your Honor.

Witness (Continuing): ——don't know.

Q. (By Mr. Hurley): I say, none that you received? A. None that I received.

The Court: Objection sustained.

Q. (By Mr. Hurley): All you know is whether—what you were handed—a search warrant?

A. Yeah, that's right.

Q. And you say you went out to the 69 Club? About what time? A. About one-thirty. [60]

Q. About one-thirty? And now, what did you first do when you got out there?

A. I read the search warrant to Mrs. Wright.

Q. Where was she?

(Testimony of Alfred Barber.)

A. Outside the Club 69 proper.

Q. What was she doing out there? Outdoors, was she? A. That's right.

Q. Outdoors? A. That's right.

Q. She wasn't in the trailer?

A. No, she was outdoors.

Q. What was she doing?

A. Standing there.

Q. Yeah? And she wasn't in the trailer?

A. No, she wasn't.

Q. But she was standing outside?

A. That's right.

Q. And you read the search warrant to her?

A. That's right.

Q. And was Greer out there when she was standing out there? A. That's right.

Q. And she wasn't in the trailer at all then?

A. She may have been after, but when I read the search warrant to her—— (Interrupted.)

Q. When you first got out there, she was [61] outdoors? A. That's right.

Q. How far from the front door?

A. Oh, about two or three feet, I imagine.

Q. Standing right out there in front?

A. That's right.

Q. And she wasn't in the trailer cabin at all?

A. She may have gone after, but at that time, she wasn't.

Q. Who was with you when you come there?

A. There were Deputy Marshals Arthur Bremer, Martin Urie, Treasury Agent Power Greer, four

(Testimony of Alfred Barber.)

agents from the Office of Special Investigation attached to Ladd and Eilson Fields.

Q. Did you have any photographers?

A. Yes, I did.

Q. How many? A. One.

Q. Is that all? A. That's right.

Q. That made how many altogether?

A. Total of 8 men.

Q. I see. And did you make any investigation after you found these cigarettes on the floor to find out who dropped them there?

A. They were there.

Q. I say, did you make any investigation to find out who had dropped cigarettes on the floor? [62]

A. Yes, I did.

Q. You did? Did you find out who dropped them?

A. To my knowledge, nobody dropped them.

Q. They didn't? They just grew there.

A. No, they were laying there.

Q. And that is a natural place to keep marijuana cigarettes is it, on the floor?

A. I don't know.

Q. I see. And how many people had been in there that day? A. I don't know.

Q. You made no investigation to find out?

A. Yes, I made some.

Q. How many people had been in there that day before one o'clock from the time the place closed until one o'clock that afternoon? How many people had been in there?

(Testimony of Alfred Barber.)

Mr. Hepp: Your Honor, I don't—there is no evidence of when this place closed or anything else and I think this is—— (Interrupted.)

The Court: Objection sustained.

Q. (By Mr. Hurley): And who was there when you come there, in the place?

A. Mrs. Wright.

Q. Inside? I thought she was—you said she was outside?

A. You said when the cigarettes was picked up.

Q. I say, how many people were in the place when you come [63] in the place, in the building?

Mr. Hepp: I object to counsel taking that argumentative tone.

Mr. Hurley: Well, I want to find out—— (Interrupted.)

The Court: I will sustain the objection.

Q. (By Mr. Hurley): How many people were in the building—— (Interrupted.)

The Court: Tone is very objectionable.

Q. (By Mr. Hurley, continuing): ——when you got there? A. (Pause.) About four people.

Q. Was Mrs. Wright in the building or outside when you got there?

A. When I got there, Mrs. Wright was standing outside the building.

Q. And when you went in the building, was anybody in the building that wasn't outside when you got there? A. No.

Mr. Hepp: Your Honor, that question is—— (Interrupted.)

(Testimony of Alfred Barber.)

Q. (By Mr. Hurley): There was nobody in the building?

A. Yes, they were in the building, but they were not standing outside when I got there. [64]

Q. How many was there—— (Interrupted.)

A. What's that?

Q. How many people were there in the building when you went in? A. Around four.

Q. Who were they?

A. Opal Weldon—that's Mrs. Weldon; a colored soldier from Ladd Field and a white soldier from Ladd Field and another girl—colored girl—I don't know her name.

Q. How many colored people around in the building when you went in? A. Three.

Q. And a white soldier? A. Yes.

Q. Do you know where the soldier is?

A. Do I know where he is now?

Q. Yes. A. He's a soldier at Ladd Field.

Q. Out at Ladd Field now?

A. Yes, he is.

Q. Do you know where the colored soldier is?

A. He is at Ladd Field, I suppose.

Q. Do you know where the two women, colored women, are now that were in there?

A. No, I don't. [65]

Q. What were they doing when you went in there?

A. Well, when I first went in the building, Mr. Greer opened the door and I saw a nude colored

(Testimony of Alfred Barber.)

girl, Opal Weldon, go behind a curtain. That's—I saw her the first thing.

Q. What were the other people doing there?

A. They were sitting down.

Q. Whereabouts? A. In a chair—sofa.

Q. What chair?

A. One chair near the room.

Q. Three of them sitting down? A. Yes.

Q. I see. And one of them was where, that wasn't sitting down?

A. She was inside the room.

Q. Same room?

A. No, not the same room.

Q. What? A. No, not in the same room.

Q. What room was she in?

A. She was in the room to the left.

Q. And the two soldiers and the other girl was in the main room, is that right?

A. They came out—one colored soldier came out of the room and he sat down on the sofa. [66]

Q. Came out of what room?

A. The room that the girl was in.

Q. I see. And the other two, the white soldier and the other girl was sitting in the main room?

A. That's right.

Q. Was one of them sitting in the chair where these cigarettes had been dropped behind the chair?

A. I don't know.

Q. You don't know? A. No, I don't.

Q. So, you made no attempt to find out any-

(Testimony of Alfred Barber.)

thing about who dropped the cigarettes behind the chair?

A. I don't know if anybody dropped them or not.

Q. But I say, you made no attempt to find out how they got there?

A. Yes, I asked them.

Q. Asked who?

A. I asked the soldier.

Q. Oh! You did?

A. Yes, I did.

Q. Oh, you did make an attempt to find out?

A. Yes, I did.

Mr. Hepp: I object to that kind of reasoning. This witness stated that he had investigated this matter in response to the first question. [67]

Mr. Hurley: Oh—the jury heard his testimony.

Mr. Hepp: Well, I am asking the court—
(Interrupted.)

Mr. Hurley: You can't change it, Mr. Hepp.

Mr. Hepp: Well, I am not trying to change it, Mr. Hurley.

The Court: Counsel will address the court. Don't address each other.

Mr. Hurley: That's all. You may—go on re-direct.

Re-direct Examination

By Mr. Hepp:

Q. What did these people say that you asked
—— (Interrupted.)

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial.

Mr. Hepp: Now your Honor, he has gone into

(Testimony of Alfred Barber.)

this matter. He wants to know all about this investigation out there and I can ask—— (Interrupted.)

The Court: I will sustain the objection.

Mr. Hepp: I believe that's all, Mr. Barber.

(Alfred Barber left the witness stand.) [68]

Mr. Hepp: Call Arthur Bremer.

ARTHUR S. BREMER,

called as a witness in behalf of the government,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Hepp:

Q. Would you state your name, please?

A. Arthur S. Bremer.

Q. By whom are you employed, Mr. Bremer?

A. United States Marshal.

Q. In what capacity?

A. A Deputy Marshal.

Q. How long have you been in that office, Mr. Bremer?

A. Since a year ago August.

Q. Do you know Raymond Wright, the defendant?

A. Yes.

Q. Do you know Vernestine Wright, the other defendant?

A. Yes, I do.

Q. How long have you known either of them?

A. Oh, I have known Ray Wright about, I guess three years.

Q. And Vernestine Wright?

A. I think I saw her the first time last summer.

Q. Are you familiar with the premises in town known as the Club 69? [69]

A. Yes.

(Testimony of Arthur S. Bremer.)

Q. Did you have occasion to go to the Club 69 on August 4th of this year? A. Yes.

Q. What was the occasion of your going there, Mr. Bremer?

A. I was helping Al Barber execute a search warrant.

Q. What did you do when you got there?

A. Well, I was assigned to search one particular white cabin, so I did so.

Q. You searched a white cabin? A. Yes.

Q. Where is that white cabin in relation to the Club 69, Mr. Bremer?

A. Well, it is, I guess you would say to the rear of the club; west anyway.

Q. What did you find, if anything, in this cabin?

A. The only thing I found of any interest to what I was looking for was a Velvet tobacco can.

Q. Where did you first see it?

A. The man who came in to help me search found it in the closet, laid it on the table and I picked it up and inspected it and it appeared to have—— (Interrupted.)

Mr. Hurley: We object to that, to what he thinks it had.

Mr. Hepp: He said it appeared to have. [70] I think he can state what it appeared to have.

The Court: Describe the contents.

Witness: Well, it had a residue of, I guess you would say leaves and flowers. It is about the only way you could describe it, fragments of some kind of plant, dark green in color and was—there was

(Testimony of Arthur S. Bremer.)

kind of a—well, like creosote or tar or something like that in the can that these things adhered to.

Q. (By Mr. Hepp): Who was in the cabin at the time you were searching, Mr. Bremer?

A. A fellow name of Tweedy and Walter Siler.

Q. Do you know whether or not they are connected with any organization?

A. They are known as members of the O.S.I.

Q. What kind of an organization is that?

A. Well, that's the air force version of the Federal Bureau of Investigation, I guess.

Q. Did you search any other area while you were there, Mr. Bremer?

A. Yes, just the whole premises generally. After we found it in the white cabin and the other boys weren't through yet, so I wandered around the whole area there out in the grass and brush out behind. And I looked at that and there is a house under construction next door and I looked [71] that over.

Q. Did you find anything?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial, no proper foundation laid and has no connection with these defendants whatever.

Q. (By Mr. Hepp): Just say "yes" or "no."

The Court: Objection overruled.

Q. (By Mr. Hepp): Did you find anything?

A. Yes.

(Testimony of Arthur S. Bremer.)

Q. Where did you—at what location did you find anything, Mr. Bremer?

A. Well, just west of this white cabin is kind of a grassy vacant lot or some lumber and some brush and out there I saw another tobacco can and I went over, picked it up and it had the same—
(Interrupted.)

Mr. Hurley: I move that the answer be stricken out as incompetent, irrelevant and immaterial, no proper foundation laid, no connection shown whatever of any kind.

The Court: Motion denied.

Q. (By Mr. Hepp): Would you just finish your sentence?

A. It contained the same kind of leaves and flowers and [72] this peculiar creosote looking substance that was in the other can.

Q. Was your attention directed to anything else during your search, Mr. Bremer?

A. Well, with that to start with, I looked for more and I found two others within few feet of that one.

Q. How far would you say that this position was from the—any of the buildings that you stated—that constituted the Club 69?

A. Well, I would say about 10 feet from this white cabin. That is 15 feet west of it.

Q. Is there any fence or other boundary mark between this place where you found these cans and the Club 69? A. No.

(Testimony of Arthur S. Bremer.)

Q. Did you see either of the defendants at the time you were out at the Club 69 on this date?

A. Later on I saw Vernestine in the club when I went in there.

Q. Did you see Mr. Wright?

A. No, I didn't.

Q. What did you do after you observed this can in the cabin—that is—yes, in the cabin?

A. I put the can in my pocket.

Q. Did you—just “yes or no,” did you discuss the matter with anyone at that time? [73]

A. I showed it to at least one of the men that was with me, but I don't remember which one now.

Q. After you put the can in your pocket, what became of it then?

A. Well, later on when I went in the club, I handed it to Mr. Greer.

Q. What did you do, if anything, with the three cans that you found out in the brush?

A. The others I left right where I found them after I had looked at them and took Mr. Greer and showed him where each one was and let him pick them up so he would know where they were.

Q. Did he pick them up? A. Yes.

Q. Are you familiar with the substance—a substance that is known as marihuana?

A. I guess I am now. I don't know—— (Interrupted.)

Q. At the time when you went to the premises of the Club 69, were you familiar with it?

A. No.

(Testimony of Arthur S. Bremer.)

Q. Had you seen any before?

A. Not to my knowledge.

Mr. Hepp: That's all. You may question the witness. [74]

Cross-Examination

By Mr. Hurley:

Q. You say you went out with a search warrant?

A. Yes.

Q. And do you know who—did you see the affidavit that the search warrant was issued on?

A. No.

Q. You don't know who made it? A. No.

Q. You don't know where it was made?

A. No, I don't.

Q. And what time did you leave the office that day?

A. It was approximately one-thirty. I don't remember exactly.

Q. Who was with you?

A. Mr. Greer and Mr. Barber and Mr. Urie and Mr. Tweedy and Mr. Siler and there was one other O.S.I. man. I am not sure of his name.

Q. I see. And where did you leave from?

A. From the rear of the post office here.

Q. How many cars? A. Two.

Q. And who was in the car with you?

A. Let's see. Mr. Barber and Mr. Greer and Mr. Tweedy and Mr. Siler. [75]

Q. I see, and when you got out there, you all got out of the car, did you? A. Yes.

Q. And what did you do then?

(Testimony of Arthur S. Bremer.)

A. Well, I went to the white cabin that I was assigned to.

Q. I see. But did you walk up to the 69 Club?

A. I didn't, no.

Q. You didn't walk towards it at all?

A. No, I think I went right straight to the cabin.

Q. How far were you from the club, the 69 Club building, when you got out of the car?

A. Oh, in exact feet I couldn't say. I suppose
—— (Interrupted.)

Q. I don't want the exact feet. About how far?

A. Oh, about 20 feet.

Q. I see. And could you see the front door?

A. Yes.

Q. The front of the building?

A. Well, the door anyway.

Q. Well, the door is in the front part of the building, isn't it? You could see the front of the building? A. Yes.

Q. Did you see Mrs. Wright standing out there?

A. No, I didn't.

Q. She wasn't out there in the front of the building?

Mr. Hepp: I object to that. He just [76] said he didn't see her out there. I think counsel is putting words in this witness' mouth.

Mr. Hurley: I got a right to put them there.

Mr. Hepp: You haven't that right.

Q. (By Mr. Hurley): She wasn't out there in front? A. I don't think she was there.

Q. Where was she? A. That I don't know.

(Testimony of Arthur S. Bremer.)

Q. Where was she the first time you saw her?

A. Inside.

Q. Inside the—— (Interrupted.)

A. Club 69.

Q. The 69 Club? But you could see 20 feet right up to the door when you got out of the car, couldn't you?

A. I could if I looked in that direction. I was going to the white cabin.

Q. What direction is the white cabin from the car? A. It was slightly ahead.

Q. What? A. Slightly ahead of the car.

Q. And what direction was the front door of the 69 Club when you got out—— (Interrupted.)

A. Slightly to the rear. [77]

Q. Slightly to the rear. And how far was this cabin from the 69 Club?

A. Oh, it is pretty hard to remember exactly. I would say probably 30 feet if you took it on a direct line.

Q. Thirty feet?

A. There is a trailer between the two.

Q. Between the 69 Club and this cabin?

A. Yes.

Q. You could see the trailer and you could see the front of the 69 Club and you could see the cabin? A. Yes.

Q. When you got out of the car? A. Yes.

Q. All in plain sight? A. Certainly.

Q. I see. (To Court): It's just 12 o'clock, your Honor.

The Court: Yes.

Mr. Hurley: I have a few more questions to ask this witness.

The Court: We will adjourn to two o'clock, ladies and gentlemen of the jury.

(At this time, the Court duly admonished the jury and the trial of this case was recessed until two o'clock p.m.)

(At two o'clock p.m., the trial of [78] this cause was resumed.)

The Court: Any ex parte matters? Call the roll of the jury.

(Whereupon, the Clerk of the Court called the roll.)

Clerk of the Court: They are all present, your Honor.

The Court: Counsel ready to proceed with the trial of this case, 1509 criminal?

Mr. Hepp: Ready, your Honor.

Mr. Hurley: Ready, your Honor.

The Court: Very well. Call your witness.

(Mr. Arthur Bremer, having been previously sworn, resumed the stand.)

Mr. Hurley: I don't think there is anything further on cross-examination, your Honor.

The Court: Any rebuttal?

Mr. Hepp: I have no further questions.

The Court: That's all then.

(Mr. Arthur Bremer left the witness stand.)

Mr. Hepp: Call Martin Urie, please.

MARTIN URIE,
called as a witness in behalf of the government,
being first duly sworn, testified as [79] follows:

Direct Examination

By Mr. Hepp:

Q. Would you state your name for the jury, please? A. Martin J. Urie.

Q. By whom are you employed, Mr. Urie?

A. Department of Justice.

Q. And in what capacity?

A. Deputy Marshal.

Q. Where is your station?

A. Fairbanks, Alaska.

Q. How long have you been in the Department of Justice, Mr. Urie?

A. Since September 23, 1949?

Q. Has that been here in Fairbanks?

A. Yes.

Q. Do you know the defendant, Raymond Wright? A. Yes.

Q. Do you know the defendant, Vernestine Wright? A. Yes.

Q. How long have you known Raymond Wright?

A. Well, probably about a year and two months since I came to Fairbanks.

Q. And how long have you known Vernestine Wright? A. About the same time. [80]

Q. Are you familiar with the premises known as the Club 69 in Fairbanks area?

(Testimony of Martin Urie.)

A. Yes, I am.

Q. How often—have you ever been to those premises? A. Yes, I have.

Q. How often have you been out there, Mr. Urie?

A. I have been out there a number of times.

Q. Do you know who operates the Club?

A. Yes, I do.

Q. Who operates the Club 69?

A. Raymond Wright and Vernestine Wright.

Q. Have you ever seen them out there on the premises of the Club 69? A. Yes, I have.

Q. More than once? A. Yes.

Q. Did you have occasion to go to the Club 69 on August 4th of this year? A. I did.

Q. What was the occasion of your going to the Club 69, Mr. Urie?

A. To assist in the execution of a search warrant.

Q. I wonder if you would just raise your voice just a little bit so we can all hear every word. You say you went to assist in the execution of a search warrant? [81] A. Yes.

Q. Who did you go with if anyone else was with you?

A. There were eight of us including myself.

Q. Could you name them? A. Yes, I can.

Q. Would you raise your voice and name them, please, Mr. Urie?

A. Mr. Greer, a Treasury agent, and Alfred Barber, a Deputy United States Marshal; Art Bremer, another Deputy United States Marshal, and myself. and then there were four O.S.I. men from Ladd

(Testimony of Martin Urie.)

Field. It was Mr. Tweedy, Mr. Dennis and the other two I can't recall their names at the time.

Q. What did you do, Mr. Urie, when you arrived at the Club 69 premises?

A. When I arrived at the Club 69, I went to the silver trailer. That was my duty to walk over there and search the silver trailer after the search warrant was read.

Q. I am afraid we are missing some of your words. Could you raise your voice to a volume and hold it there, please? Would you state that last answer again?

A. My duty was to search the silver trailer after the search warrant was read and upon arriving at the Club 69, I went right to the silver trailer.

Q. What did you do there?

A. I knocked on the door and Vernestine Wright answered [82] from inside.

Q. What did you do then?

A. She came to the door and I told her to go over to the Club 69 building.

Q. What did she do then?

A. I believe she put a kimono on or a coat and went over to the Club 69?

Q. Was anyone there at the time?

A. Anyone where?

Q. Did you see anybody—I will withdraw that question. Whereabouts to the Club 69 did you see Vernestine go?

A. She went over to the entrance of the Club 69 on the porch.

(Testimony of Martin Urie.)

Q. Did you see anything occur there?

A. Yes. Deputy Barber read the search warrant to her on the porch.

Q. On the porch? A. On the porch.

Q. What did you do next?

A. After the search warrant was read, I went into the trailer and started searching.

Q. Did you find anything that you were searching for in the trailer? A. No, I didn't.

Q. Where did you go next? [83]

A. After we finished the trailer, I went to the Club 69 in the main part of the building.

Q. After you arrived in to the main portion of the building, was your attention attracted to anything?

A. Yes. I helped Deputy Barber search there for a while and then he turned over a chair and saw the marihuana cigarettes on the floor.

Q. Had he touched these cigarettes before you saw them? A. No, he didn't.

Q. Were you looking over in that direction at the time, Mr. Urie?

A. Yes, I was just as he turned the chair over and I looked over.

Q. What happened then, if anything?

A. Deputy Barber picked the cigarettes up and called for Mr. Greer?

Q. Mr. who? A. Greer.

Q. Uh-huh. Did Mr. Greer show up?

A. It was about, oh, I think probably half a minute before he came in from outside the building.

(Testimony of Martin Urie.)

Q. Was either of the two defendants in these premises, that is, in the Club proper premises during the time that you searched in there?

A. Yes. [84]

Q. Who was present?

A. Vernestine Wright.

Q. Just "yes" or "no," did you hear any conversation concerning these cigarettes following the finding in the presence of either of the defendants?

A. Yes.

Q. Who was present at that time?

A. Deputy Barber, Deputy Bremer and I believe two of the O.S.I. men and Vernestine Wright and there were a couple of her friends in there too. I don't recall their names at all.

Q. What was said, Mr. Urie?

A. I can't recall the statement Mr. Barber said. He said something to Vernestine Wright, but I can't recall it.

Q. Did she make any response to that statement?

A. Well, there was some answer she made but I can't recall the answer either.

Q. At any time when Mr. Greer was in the Club 69 premises proper, that is in the main building, and in the presence of either of the defendants when Mr. Greer was in there, did you hear any conversations with either of the defendants, Mr. Urie?

A. There was a conversation but I can't recall the exact wording of the conversation.

Q. Mr. Urie, I show you government's identification number four purporting to be a photo-

(Testimony of Martin Urie.)

graph (handed to witness) and [85] ask you to examine it, please. (Pause.) State if you know what it is?

A. That chair is a chair in the Club 69 room. I believe that's the one that the cigarettes were under.

Q. Does that photograph faithfully represent that scene as you viewed it at the time you were out there on August 4th, Mr. Urie? A. Yes.

Q. I show you government's identification number five (handed to witness), purporting to be a photograph and ask you to examine it, please. (Pause.) State if you know what it is.

A. That is the same chair in the Club 69.

Q. Does that photograph faithfully represent the subject matter that it purports to as you viewed it when you were out there on August 4th?

A. Yes.

Q. I show you government's identification number six (handed to witness) and ask you to examine it, please. (Pause.) State if you know what it is, please.

A. That is the chair in the Club 69. The cigarettes are showing underneath it about the same position after it was overturned.

Q. And you saw those cigarettes in that position before they were disturbed, is that right, Mr. [86] Urie? A. Yes, I did.

Q. Does that photograph faithfully represent the subject matter it purports to as you viewed that subject matter on August 4th? A. It does.

(Testimony of Martin Urie.)

Q. I show you government's identification number seven (handed to witness) and ask you to examine it, please. (Pause.) State if you know what it is.

A. Well, that's a chair overturned in the Club 69 and the cigarettes were close to the wall.

Q. Does that photograph faithfully represent the subject matter it purports to as you viewed that subject matter on August 8th of this year?

A. It does.

Q. I show you government's identification number 8 (handed to witness). (Pause.) State if you know what it is, please.

A. That is the marihuana cigarettes somewhere on the floor in the Club 69.

Q. Does that picture show that position of those cigarettes as you viewed the cigarettes when you were out there on August 8th? A. Yes.

Q. Does that photograph faithfully represent the subject matter of its contents that it purports to represent as you [87] viewed it on August 8th—4th of this year? A. It does.

Q. That is in the Club 69? A. Yes.

Q. Did you see Mr. Wright at the time when you were out making this search? A. I did not.

Q. Did Mrs. Wright, that is to say, did Verne-stine Wright say anything about his whereabouts while you were there, Mr. Urie?

A. Not to my knowledge she didn't.

Q. Do you know where Mr. Wright was living at the time, Mr. Urie?

A. Club 69, I believe.

(Testimony of Martin Urie.)

Mr. Hurley: I move that that be stricken out; not responsive to the question.

Mr. Hepp: Your Honor, he responded exactly.

Mr. Hurley: He didn't say he knew.

The Court: I will strike it. Just answer "yes" or "no."

Q. (By Mr. Hepp): Just answer "yes" or "no," Mr. Urie, do you know where Mr. Wright was living at the time when you were out there?

A. Yes. [88]

Q. Where was he living?

A. The premises of the Club 69 in the silver colored trailer out in the Club 69.

Q. In a number of feet, where is that in relation to the Club 69 premises proper where—where is this trailer that you are talking about?

A. It would be about 25 feet from the main building on the west side of the entrance of the club.

Q. And it was in that trailer that you first—that you saw Mrs. Wright? A. Yes.

Mr. Hepp: That's all. You may question the witness.

Cross-Examination

By Mr. Hurley:

Q. How long have you been a Deputy Marshal, Mr. Urie? A. Since September, 1949.

Q. And I believe you testified you had been out to the 69 Club a good many times on numerous occasions prior to the 4th of August of this year, is that right? A. That's right.

(Testimony of Martin Urie.)

Q. What were you doing out there?

A. One time before we had a search warrant to serve out there. [89]

Q. Just once? One search warrant? Now, what other occasions were you out there on?

A. I was out there on quite numerous occasions. Couple of times to serve papers on Mr. Wright, civil papers.

Q. You served civil papers on him in how many occasions?

A. Few times.

Q. How many?

A. A few times.

Q. Well, what do you mean by "few"? Once or twice?

A. Probably twice.

Q. How many other times had you been out there?

A. Oh, I have been out there probably few more times, couple of times.

Q. What for?

A. One time we were making a raid on the premises.

Q. What?

A. We were making a raid on the premises.

Q. I see. Any other occasions you have been out there?

A. Yes.

Q. When?

A. I was out there assisting military police; the M.P.'s couple of times to locate a couple of their men.

Q. What?

A. To locate a couple of their men.

(Testimony of Martin Urie.)

Q. You went out there looking for them? [90]

A. Yes.

Q. Is that all you were ever out there?

A. I believe that's all.

Q. And you said very positively that Mrs.—that Mr. Wright was living there on the 4th of August. How do you know?

A. About every time I was out there, Mr. Wright was there.

Q. How many times were you there? What do you mean?

A. Probably six or seven times.

Q. Was he out there on the 4th of August?

A. No, he wasn't.

Q. Did you make any inquiry as to what he was doing at that time? A. Yes.

Q. What? A. I didn't!

Q. Well, didn't you know he was building a house?

A. I heard that he was building a house, yes.

Q. Yes. And he wasn't around there when you went out there on the 4th of August and hadn't been there for some time, isn't that what you found out? A. No.

Q. It wasn't? You didn't inquire then?

A. I never inquired, no.

Q. What kind of a raid did you say you [91] made?

Mr. Hepp: Now, your Honor, I don't know that—I think that is a confusing issue. Counsel is entitled to ask him on what occasion he went out

(Testimony of Martin Urie.)

there but then to go into the details of another matter—— (Interrupted.)

Mr. Hurley: He said he made a raid out there.

Mr. Hepp: It is just a confusing collateral issue, your Honor. It may have its place in another—— (Interrupted.)

The Court: State your objection.

Mr. Hurley: I will withdraw it.

The Court: Do you have an objection? Very well, he withdraws it.

Mr. Hurley: I withdraw it. I don't care.

Q. (By Mr. Hurley): Do you know what Mr. Wright was doing on the 4th of August, 1950?

A. No.

Q. Do you know what he was doing on the 3rd?

A. No.

Q. Do you know what he was doing on the 2nd?

A. No.

Q. Do you know where he was?

A. I imagine—— (Interrupted.) [92]

Q. I am not asking you what you imagine. I am asking if you know. A. I don't know.

Q. No? That's what I thought you knew. Do you know—you don't know where he was?

A. No.

Q. And you made no investigation to find out?

A. Well, after Vernestine was brought in, Raymond Wright came in the building.

Q. What?

A. After Vernestine Wright was brought in

(Testimony of Martin Urie.)

from the Club 69 on August 4th, Mr. Wright came in the Federal Building.

Q. Oh, that was—that would show where he was on the 2nd and 3rd, would it?

A. It shows where he was on the 4th.

Q. It would? A. In Fairbanks.

Q. When he came in to the Federal Building, that would show where he was on the 4th of August when you were out there?

Mr. Hepp: I object to that, your Honor. That wasn't part of his question.

The Court: Well, state your objection. What is it? What's the ground?

Mr. Hepp: I object to the question as [93] indefinite.

Mr. Hurley: It wasn't indefinite.

The Court: I will sustain the objection.

Q. (By Mr. Hurley): You say he came in to the Federal Building when?

A. On August 4th.

Q. And would that give any indication to you where he was on the 2nd or 3rd of August?

A. No.

Q. Well, where was he then, do you know?

A. I don't know.

Q. You don't know whether he was living at the 69 Club or not, do you? A. No.

Q. So, you didn't know where he was living?

A. Well, I believe he was living at the Club 69.

Q. I understand you believe it, yes, but you don't know, do you?

(Testimony of Martin Urie.)

A. I seen him out there a number of times.

Q. Yes, but you don't know where he was living at that time, do you?

A. On the 2nd and 3rd, I don't know.

Q. No! That's what I thought. You say when you went out there—where did you leave from?

A. From the Federal Building. [94]

Q. And how many cars left? A. Two.

Q. And which car were you in, the first car or the second car? A. I was in the first car.

Q. Who was with you?

A. There were three other fellows. They were three O.S.I. men.

Q. What? A. Three O.S.I. men.

Q. With you? You were—that was the first car that went out? A. Yes.

Q. And who was with you?

A. Three O.S.I. men.

Q. I see. And who was in the second car?

A. Deputy Barber, Deputy Bremer, Mr. Greer and another O.S.I. fellow.

Q. And how far behind you were they?

A. They were right behind me.

Q. And when you got out there, where did you stop your car? A. In front of the Club 69.

Q. And where did the people behind you, the Marshals behind you, stop their car? [95]

A. I believe alongside of me.

Q. Alongside of you? I see. And had you got out of the car before they stopped or were you just getting out of the car? A. I can't recall that.

(Testimony of Martin Urie.)

Q. You don't remember? A. No, sir.

Q. You don't know whether you was out of the car when they stopped or whether you all got out at the same time or whether they got out first or whether you got out first, is that right?

A. I believe I was the one—first ones out because I was over at the—— (Interrupted.)

Q. What?

A. I believe I was one of the first ones out.

Q. Who did you see after you got out first outside of the cars?

A. Oh, I went right to the silver trailer.

Q. I know. But who did you see first? I didn't ask you what you did. I asked you who you saw among the other people that went out there. After you got out of the car, who did you see first outside of the car? A. I don't follow your statement.

Q. What?

A. I don't follow your question, Mr. [96] Hurley.

Q. You don't what?

A. I don't follow your question.

Q. I say, when you got out of the car, who was the first man that went out with you in either car that you saw outside of the car after you got out?

A. Bill Dennis was the O.S.I. man and I went right to the silver trailer.

Q. I asked who you saw get out of the car first after you got out?

A. After I got out? Just like I stated, I went right to the silver trailer with Dennis.

(Testimony of Martin Urie.)

Q. But you didn't see anybody else get out of the car? Did you close your eyes?

A. The other fellows were getting out of the cars, yes.

Q. Who did you see first?

A. I can't recall who I saw—— (Interrupted.)

Q. Can you remember anybody you saw get out of either one of the cars?

A. Well, all the fellows got out of the cars.

Q. You saw them get out? A. Yes.

Q. And then you went over where?

A. To the silver trailer.

Q. I see. And what did the other guys do.

A. They went to their station. [97]

Q. What? A. They went to their stations.

Q. Where were their stations?

A. Well, mine was the silver trailer.

Q. I didn't ask you what your station was. I say where did they go?

A. Where they were assigned to go.

Q. What?

A. Where they were assigned to go.

Q. Well, where?

A. I can't recall just which ones went to which position, Mr. Hurley.

Q. I don't know! Where did they go?

Mr. Hepp: Your Honor, I am going to object to the attitude that counsel is taking.

The Court: Objection sustained.

Mr. Hurley: I am having an awful time trying to get an answer to the questions, your Honor.

(Testimony of Martin Urie.)

The Court: I think he has told you. I think he has answered it already.

Q. (By Mr. Hurley): Where did they go?

A. They went to their stations.

Q. Well, I don't know what you mean by "stations." When they got out of the cars, I want to know where they went. [98] "Stations" don't mean anything to me or the jury, either one.

A. Well, I believe—I can't remember which O.S.I.— (Interrupted.)

Q. I don't care whether you remember—— (Interrupted.)

Mr. Hepp: I object to Mr. Hurley objecting when this witness tries to answer his questions, your Honor.

The Court: Alright, objection sustained.

Mr. Hurley: Alright, then. If he has to name them, let him name them.

Q. (By Mr. Hurley): Go ahead.

A. I believe there was four positions, four stations. One was the silver trailer where 2 of us went to. Then another was the main building, the Club 69, and the other the white house.

Q. What I want to know is where these men went that got out of the cars. I don't care anything about stations. I just want to know where they went.

A. Well, they went where they were assigned to go. I mean—— (Interrupted.)

Q. I understand that. I understand that. But I want to know where they went.

(Testimony of Martin Urie.)

Mr. Hepp: Your Honor, I am going to object to this. There's—— (Interrupted.) [99]

Witness: I don't—— (Interrupted.)

Mr. Hepp: Just a minute, Mr. Urie. There is no foundation laid to show that this witness knows. He can testify where he went but there is nothing to show he knows where these men went. I am going to object to this until the proper foundation—— (Interrupted.)

The Court: Objection sustained.

Q. (By Mr. Hurley): Do you know where these men went that got out of the cars?

A. No, I don't. I know where they probably were supposed to go.

Q. But you don't know where they went?

A. No.

Q. You didn't see them go? A. No.

Q. Now, where was the car that you got out of with respect to the front door of the 69 Club?

A. It was probably 20 feet south of the building.

Q. And was that opposite, right opposite, the front door of the club?

A. I couldn't state if it was right opposite the front door but it was—— (Interrupted.)

Q. Could you see the front door of the club from your car where you stopped? [100]

A. No.

Q. Why couldn't you?

A. The front door is facing west on the main building.

(Testimony of Martin Urie.)

Q. What?

A. The front door is facing west.

Q. Yeah.

A. And I couldn't see the front door.

Q. Well, why not?

A. I just couldn't see, I guess. The car wasn't parked far away west to see it.

Q. Where was the car parked with respect to the building? A. At about 20 feet south of it.

Q. Where with respect to the building? South, you say? You say it was south?

A. It was south of the building, yes.

Q. 20 feet south. That was your car?

A. Yes.

Q. And where was the other car parked with respect to the building?

A. I believe probably about 29 or 30 feet south of the building.

Q. What?

A. About 29 or 30 feet south of the building.

Q. And it was south of your car?

A. Yes. [101]

Q. And what direction does the building face?

A. You mean what direction—— (Interrupted.)

Q. The front door of the building, what direction does the front door of the building face of the 69 Club? A. It faces west.

Q. It faces west?

A. But to enter the building—the door faces west.

(Testimony of Martin Urie.)

Q. Is it a square building or what kind of a shaped building is it?

A. It is a square building but there is a porch that—— (Interrupted)

Q. It has a porch on the front of the building, over the front door?

A. No. There is an open porch.

Q. Open porch? A. Yeah.

Q. Well, it has a porch then on the front door of the building? A. It has a platform porch.

Q. At the front door? A. Yeah.

Q. And you say the front door faces west?

A. Yes.

Q. And what direction was your car from the building when you stopped? [102]

A. It was facing west.

Q. I didn't ask you where it faced. I asked what direction was your car from the building when you stopped it? A. South.

Q. I see. That is, you went past the building where you stopped your car? A. No.

Q. Well, you drove from north to south when you went south—when you went out there, didn't you? A. Yes.

Q. And you went past the building, didn't you?

A. Going south, yes.

Q. I say you went past the building before you stopped your car? A. Yes.

Q. Why did you drive past the building?

A. Well, there is a driveway, Mr. Hurley, when

(Testimony of Martin Urie.)

you go south and you have to turn west and then you park in front of the building.

Q. In front of the front part of the building?

A. Yes.

Q. So, you parked in the front of the building?

A. Yes.

Q. And how far was the front door when you parked in front of the building from your [103] car? A. Approximately 20 feet.

Q. And what direction was your car from the front door of the building? A. South.

Q. South? Well, does the building face south, the front door face south?

A. The entrance to the building faces west.

Q. And were you on the west side of the building when you stopped your car? A. No.

Q. But you could see the front door, couldn't you? A. Couldn't.

Q. Why?

A. Because I wasn't far enough west to see the front door.

Q. So you went—you drove by the building over to the south side of the building, is that it?

Mr. Hepp: Now, I am going to object to that— (Interrupted.)

Mr. Hurley: Well, I can't— (Interrupted.)

Mr. Hepp: Just a minute, Mr. Hurley. Let me finish my objection. I object unless counsel specifies what part of the building he went past. You could go on around four sides of the building and

(Testimony of Martin Urie.)

I suppose half way it would be passing the building. Counsel has not made his questions clear. [104]

Mr. Hurley: I have done my best, your Honor. I'll try it again.

Q. (By Mr. Hurley): What part of the building did you pass when you went out there in the car? A. We passed the east side.

Q. The east side? A. Yes.

Q. And then where did you go after you passed the east side of the building? Where did you go then?

A. Then you make a right hand turn.

Q. And then what part of the building did you pass?

A. It would be the south side of the building.

Q. South side of the building? A. Yes.

Q. You passed the south side?

A. I didn't pass the south side. I parked on the south side of the building.

Q. That is, you drove by on the east side, then you crossed the south side of the building and you parked your car, is that right?

A. Yes. After you make a right hand turn—
(Interrupted.)

Q. What is that?

A. After you make a right hand turn.

Q. I don't care what kind of a turn you make. I want [105] to know where you parked. You say you passed first the east side of the building in your car and then you drove across the south side of the building and then you stopped your car?

(Testimony of Martin Urie.)

A. When you drive out south Cushman extension, you are heading south and it would be—then you pass one wall of the building. You turn right, then you park on the south side of the building.

Q. I say, but did you drive by the east side of the building and then turn across the south side of the building? A. Yes.

Q. I see. And did you drive along the west side before you stopped your car? A. No.

Q. What? A. No.

Q. How far past the south side of the building were you when you stopped your car?

A. Approximately half way between the building.

Q. What?

A. About half way between the building.

Q. I say how far past the 69 Club, the south side—about how far past the south side of the 69 Club after you drove across the east side and crossed the south side, about how far did you drive beyond the south side of the [106] building before you stopped your car?

A. I didn't drive all the way past the south side of the building.

Q. You didn't pass the south side of the building? A. I parked south of the building.

Q. I say, you didn't drive across the south side of the building? A. No.

Q. You drove past the east side and part of the way across the south side, is that right?

A. Mr. Hurley, I get confused on the directions.

(Testimony of Martin Urie.)

Q. Yeah? Which side did you pass first when you drove out there?

A. We were heading south out on south Cushman, the extension of south Cushman on the right hand side of the road. There is a wall and that would be the east side looking north in the opposite direction we were going out. That would be the east side. That's what I referred to. I said we passed the east side and turned and then I parked on the south side of the building.

Q. Were you on the east side or the west side of the building facing north when you passed the building first?

Mr. Hepp: I am going to object, your Honor, to that. There is no such thing as east side or west side facing north. [107]

The Court: I think he has told you over and over, Mr. Hurley. I will sustain the objection. Get to some other subject.

Q. (By Mr. Hurley): Which side of the house is the door on, the entrance to the 69 Club?

A. There is a porch and the porch door is facing the west—is facing west.

Q. Facing west?

A. Yes. That would be on the left side of the building.

Q. What do you mean by the "left hand side of the building?"

A. That when you look—we were parked south of the building and the porch entrance is—on the—facing the west.

(Testimony of Martin Urie.)

Q. Which way were you facing when you were thinking about your left hand? A. Pardon?

Q. Which direction were you facing when you were thinking about your left hand?

A. North.

Q. North? I see. I understand that a little better now! And you got out of the car with three men?

A. Yes.

Q. Who drove the car?

A. I drove the car. [108]

Q. I see. And you went over to the wanigan near the 69 Club, did you? A. No.

Q. Where did you go?

A. I went to the trailer.

Q. Well, whatever you call it—a trailer. And what did you do when you got there?

A. I knocked on the door.

Q. And what happened?

A. Vernestine Wright answered.

Q. And had she been in bed asleep?

A. I believe she might have been laying down, yes.

Q. What?

A. I don't know if she was asleep or not.

Q. She had been in bed, hadn't she?

A. I believe so, yes.

Q. And then she got up? A. Yes.

Q. And dressed, did she?

A. I think she put a kimono on or a coat.

Q. What did she have on when she came out?

A. I believe it was a blue kimono.

(Testimony of Martin Urie.)

Q. And how long did it take her to get out of the bed and get ready to come out?

Mr. Hepp: Your Honor, I don't believe [109] there's any evidence that she was in bed. He merely says he believes she may have been laying down but I don't think that's—— (Interrupted.)

Mr. Hurley: Well then, I will reframe the question, your Honor.

Q. (By Mr. Hurley): How long did it take her to get ready after you thought she had been laying down?

A. Probably little less than a minute.

Q. What?

A. Probably little less than a minute.

Q. Less than a minute. What did you tell her?

A. I told her to go over to the Club 69.

Q. What?

A. I told her to go to the Club 69.

Q. And what did she do?

A. She went over to the Club 69.

Q. Were all these men around there when you went over there? A. No.

Q. What? A. No.

Q. Who took her over?

A. She went over by herself.

Q. Nobody went with her? [110]

A. No, because Deputy Barber was waiting for her over there.

Q. Over where? A. The Club 69.

Q. Oh! He was waiting for her to come over?

A. Yes.

(Testimony of Martin Urie.)

Q. Where was he?

A. He was on the porch in the Club 69.

Q. Did he tell you to go over and bring her over?

A. No.

Q. Who told you to bring her over?

A. No one.

Q. You just told her to beat it over to the Club 69?

A. I told her to go over to the Club 69.

Q. I say, you was the one that told her?

A. Yes.

Q. And she went over there from the—whatever you call this—what was the name you gave to it?

A. Silver trailer.

Q. Silver trailer? And she went over there from there under your direction?

A. I told her to go over there, yes.

Q. And did you walk over there?

A. No, I didn't.

Q. Where did you go?

A. I stayed by the trailer. [111]

Q. Did you go inside? A. I did.

Q. Did you search it? A. Yes.

Q. Thoroughly? A. Yes.

Q. Every place? A. Yes.

Q. So, you don't know what happened after that as far as she was concerned after you ordered her over to the Club 69, do you?

A. I saw Deputy Barber read the search warrant.

Q. Oh, you saw him? A. Yes.

(Testimony of Martin Urie.)

Q. And you know who made the affidavit to that search warrant? A. No, I don't.

Q. You don't? A. No.

Q. Well, all you know is that Barber had one?

A. Yes.

Q. Well, she wasn't standing outside around the roadhouse when you fellows got out of the car, was she? A. No.

Q. She was in this silver—what is it, the [112] silver trailer, is that right, when you boys got out of the car? A. Yes.

Q. And she didn't come out and went—you went over there and told her to get dressed and come over? A. That's right.

Mr. Hurley: That's all.

Mr. Hepp: That's all.

(Mr. Martin Urie left the witness stand.)

Mr. Hepp: Call Hugo Ringstrom, please.

HUGO RINGSTROM

called as a witness in behalf of the government, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hepp:

Q. Would you state your name, please?

A. Hugo Ringstrom, R-i-n-g-s-t-r-o-m.

Q. Where do you live, Mr. Ringstrom?

A. Seattle, Washington.

Q. By whom are you employed?

(Testimony of Hugo Ringstrom.)

A. By the Alcohol Tax Unit of the Federal Government.

Q. And in what capacity?

A. As a chemist.

Q. How long have you worked for the government, Mr. Ringstrom? [113]

A. I worked for the government since July, 1922.

Q. Have you ever been educated in the field of chemistry, Mr. Ringstrom? A. Yes, sir.

Q. Where did you receive your education?

A. At the School of Chemistry of the University of Minnesota.

Q. Did you—do you hold any degrees in chemistry, Mr. Ringstrom? A. Yes, sir.

Q. What degrees do you hold?

A. Bachelor of Science in chemistry, and Master of Arts in chemistry.

Q. When did you receive your Bachelor of Science degree in chemistry? A. 1915.

Q. And when did you receive your Master's degree in chemistry? A. 1917.

Q. Was that in the same institution that you mentioned, Mr. Ringstrom? A. Yes, sir.

Q. Do you have any duties concerning narcotics, Mr. Ringstrom? A. Yes, sir. [114]

Q. What are your duties concerning that?

A. To analyze narcotics for the Bureau of Narcotics and for other government agencies and state agencies.

(Testimony of Hugo Ringstrom.)

Q. Have you had any experience in the field of analysis of narcotics? A. Yes, sir.

Q. Approximately how many analyses have you made of narcotics, if you know?

A. It is very difficult to say. I can only make a rough estimate.

Q. Would you state that estimate?

A. In opium alkaloids probably three, four thousand, and in marihuana, around probably,—around 1,500.

Q. Mr. Ringstrom, I show you government's identification number one and ask you to examine it, please (handed to witness). (Pause.) State if you know what it is? A. Yes, I do.

Q. What is it, please?

A. That is the registered envelope that I received on August the 8th, 1950, from Treasury Agent Greer.

Q. And how was it delivered to you?

A. By registered mail.

Q. And where has it been since it was delivered to you?

A. In my possession until this morning.

Q. What did you do with it then? [115]

A. I gave it to you.

Q. Where did you give it to me?

A. As we entered the court room.

Q. I show you government's identification number two (handed to witness) and ask you to examine it and its contents. (Pause.) Please state, if you know, Mr. Ringstrom, what it is, please?

(Testimony of Hugo Ringstrom.)

A. I do.

Q. What is it? A. Marihuana.

Q. What is the nature of the container that it is in?

A. It is a sealed envelope that the Bureau of Narcotics uses for containing exhibits.

Q. I hand you—have you ever seen it before?

A. Yes, sir.

Q. Where did you first see it?

A. In the Alcohol Tax Unit laboratory in Seattle, Washington.

Q. And in what form was it when you first saw it?

A. It was sealed and inside the registered envelope 2190.

Q. What did that envelope contain, if anything, at the time when you first saw it, Mr. Ringstrom, and examined it?

A. It contained the marihuana, loose in the envelope here, and—— (Interrupted.)

Q. What quantity of marihuana? [116]

A. Seven grains.

Q. You analyzed that contents and found it to be marihuana, Mr. Ringstrom? A. Yes, sir.

Q. I show you government's identification number three (handed to witness) and ask you to examine it and the contents. (Pause.) State if you know what it is, please? A. I do.

Q. What is that article?

A. It is marihuana.

Q. What kind of container is it in?

(Testimony of Hugo Ringstrom.)

A. It is a block sealed envelope that the Bureau of Narcotics uses for narcotic exhibits.

Q. Have you ever seen that envelope before?

A. Yes, sir.

Q. Where did you first see it?

A. In the Alcohol Tax Unit laboratory in Seattle, Washington.

Q. And in what manner did you find it?

A. It was sealed and inside the registered envelope 2190.

Q. Did you examine the contents of that envelope? A. Yes, sir.

Q. And did you find anything in the envelope?

A. 16 cigarettes.

Q. Did you examine those cigarettes for their content? [117] A. Yes, sir.

Q. What is their content?

A. Marihuana.

Q. Referring to the second identification that you have examined, what did you do with that following your examination?

A. It was loose in the inside of the envelope because I took a little piece of paper and folded it into a bindle and put the marihuana inside the bindle so that they wouldn't be lost.

Q. Where has that been since that time?

A. In my possession.

Q. When did you surrender possession of that?

A. This morning.

Q. And where were you then?

A. Entering the court room.

(Testimony of Hugo Ringstrom.)

Q. To whom did you give it? A. Yourself.

Q. And in the iden—government's identification number three, which you have examined, state, if you know, where that has been since you first saw it? A. I do.

Q. Where has that been?

A. In my possession.

Q. When, if at all, did you surrender that possession, Mr. Ringstrom? [118]

A. This morning.

Q. And where did you surrender the possession?

A. Entering the court room.

Q. And to whom did you give it?

A. To yourself.

Q. Are those—is government's identification number 2 in the same condition as it was when you first saw it?

A. I have taken out and used a small quantity. Outside of that, it is.

Q. And as to the identification number three, being those 16 cigarettes, would you state, Mr. Ringstrom, whether or not they are in the same condition as when you first saw them?

A. They are except for a small quantity that I have taken out each one of the 16 cigarettes.

Q. You took this quantity out to make your analysis with, is that right? A. Yes, sir.

Q. And they are in the same condition except for that slight removal? A. Yes, sir.

Q. Is marihuana a narcotic drug, Mr. Ringstrom? A. Yes, sir.

(Testimony of Hugo Ringstrom.)

Q. Is it known by any other name, Mr. Ringstrom?
A. Yes, sir. [119]

Q. What other name is it known by?

A. Scientifically, it is known as *cannabis indica* and *cannabis sativa*. And in the underworld, it is known as sticks, reefers and weed among perhaps others that I don't know or can think of.

Mr. Hepp: That's all; you may question the witness.

Cross-Examination

By Mr. Benton:

Q. Mr. Ringstrom, when you made the analysis of the—what you have stated was marihuana, did you notice any tarry or creosote substances mixed in it that applies to the substance that had been or alleged to be the contents of some tobacco cans?

A. I did not notice any.

Q. Is creosote or tar any part of the contents of marihuana?
A. No, sir.

Q. And when you made the examination of the substance, if there had been any tarry substance or creosote, you would have noticed it, wouldn't you?

A. I think so.

Q. You made a complete test that would show that up?

A. I made a test for marihuana and corresponded. I mean, [120] this material gave all the tests for marihuana.

Q. And you didn't find any creosote or tar?

A. No, sir.

(Testimony of Hugo Ringstrom.)

Mr. Benton: That's all.

Redirect Examination

By Mr. Hepp:

Q. Mr. Ringstrom, I would like to ask you a hypothetical question. If marihuana had been stored in a can into which there may have been some other substance, would you necessarily have found that other substance present in the marihuana?

A. A tarry substance, no, because that is a solid at ordinary temperatures.

Mr. Hepp: That's all.

The Court: Any further cross-examination?

Mr. Hurley: No, that's all, your Honor.

The Court: That's all, then.

(Mr. Hugo Ringstrom left the witness stand.)

The Court: We will take a ten-minute recess.

(At this time, a short recess was taken.)

Clerk of the Court: Court is reconvened. [121]

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court called the roll.)

Clerk of the Court: They are all present, your Honor.

The Court: Counsel ready to proceed?

Mr. Hepp: Ready.

Mr. Hurley: We are ready, your Honor.

The Court: Call your next witness.

Mr. Hepp: Mr. Tweedy.

GEORGE M. TWEEDY

called as a witness in behalf of the government,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Hepp:

Q. Would you state your name to the jury, please? A. George M. Tweedy.

Q. By whom are you employed?

A. By the Air Force.

Q. And in what capacity?

A. Special agent, Office of Special Investigation.

Q. How long have you been around Fairbanks, Mr. Tweedy? A. Year and nine months.

Q. One year and nine months? And where is your station [122] of duty?

A. At Ladd Air Force Base.

Q. Do you know Mr. Power Greer?

A. I know Mr. Greer, yes, sir.

Q. Do you know Alfred Barber?

A. I do, sir.

Q. Martin Urie? A. I do, sir.

Q. Arthur Bremer? A. I do, sir.

Q. Do you know Raymond Wright, the defendant here? A. I do not, sir.

Q. Do you know who he is?

A. I know of him.

Q. Do you know Vernestine Wright?

A. I do, sir.

(Testimony of George M. Tweedy.)

Q. Are you familiar with the premises of the Club 69, Mr. Tweedy? A. I am, sir.

Q. Did you have occasion to go to the Club 69 on August 4th of this year? A. Yes, sir.

Q. What was the circumstances attending your going to the Club 69 premises then?

A. Upon request of the United States Marshal to assist [123] them.

Q. Assist them in what manner?

A. Assist them in form of an investigation.

Q. Do you have any special skill, Mr. Tweedy, that you employ in the course of your work?

A. Photographer, sir.

Q. How many years have you been a photographer? A. Little over 14 years, sir.

Q. Did you take any pictures out or around the premises of the Club 69, Mr. Tweedy, on this date that you stated that you went out there?

A. Yes, sir.

Q. I show you government's identification number four (handed to witness) and ask you to examine it and state, if you know, what it is please.

A. Yes, sir; a chair that was located in the Club 69.

Q. Does that photograph faithfully represent the subject matter which it purports to represent?

A. Yes, sir.

Q. Did you take that photograph?

A. I did, sir.

Q. Did you process the negative upon which the exposure was made? A. I did, sir.

(Testimony of George M. Tweedy.)

Q. Is that negative—did you, at any time, retouch that [124] negative? A. No, sir.

Q. Did you make that print?

A. I did, sir.

Q. Is that print made from an unretouched negative? A. That is, sir.

Q. The negative is in the same condition as when it was exposed? A. That's right, sir.

Q. I show you government's identification number five (handed to witness) and ask you to state, if you know, what it is please.

A. That is the—another view of the chair in the Club 69.

Q. Did you take that picture?

A. I did, sir.

Q. Did you process the negative upon which the exposure was made? A. I did.

Q. Did you make that print? A. I did.

Q. Was that print made from an unretouched negative that you had exposed at the Club 69?

A. It was.

Q. Does that picture faithfully represent the scene as [125] you viewed it when you photographed it? A. It does.

Q. I show you government's identification number six (handed to witness) and ask you to examine it please?

A. That is a small package of cigarettes behind the green chair. The green chair is directly on the left here with the wall—pardon me—on the left and the chair on the right.

(Testimony of George M. Tweedy.)

Q. Did you take that photograph?

A. I did.

Q. Did you make that print? A. I did.

Q. Did you make the print from an unretouched negative, Mr. Tweedy? A. I did.

Q. The negative that you had exposed out there at the Club 69? A. I did.

Q. Does that print faithfully represent the subject matter which it purports to represent as you viewed it when you photographed it?

A. It does.

Q. I show you government's identification number seven (handed to witness) and ask you to state what it is, if you know. [126]

A. That's the package of cigarettes laying against the wall, the south wall of the building—west wall of the building and the chair is turned on its side in the Club 69.

Q. Did you take that picture? A. I did.

Q. You exposed the negative of that scene?

A. I did.

Q. Did you make that print of that negative?

A. I did.

Q. Was the print made from the negative as—in its original condition as it was processed?

A. It was.

Q. Does that picture faithfully represent the subject matter which it purports to as you viewed it when you photographed the scene?

A. It does.

(Testimony of George M. Tweedy.)

Q. I show you government's identification number 8 (handed to witness) and ask you to state, if you know, what it is, Mr. Tweedy?

A. That's the package of cigarettes on the floor along the west wall of Club 69.

Q. Did you take that picture? A. I did.

Q. Did you process the negative that you exposed there? A. I did. [127]

Q. Did you make that print? A. I did.

Q. Is that print made from an unretouched negative that was exposed at that scene?

A. It was.

Q. Does that photograph faithfully represent the subject matter it purports to represent as you viewed it when you photographed it?

A. It does.

Q. Did you do any other act in the assistance that you were asked to give as you testified at your visit at the Club 69?

A. I assisted in the searching.

Q. What portion of the premises did you search?

A. I searched the small white building in the rear of the Club 69.

Q. Was your attention attracted to any object of your search while you were searching?

A. In that building, no, sir.

Q. Did you search any other place?

A. The small hut to the south of the white building behind the Club 69.

(Testimony of George M. Tweedy.)

Q. Is that in close proximity to the main building?
A. Approximately 45, 50 feet.

Q. In which direction? [128]

A. That would be southwest.

Q. South and west?

A. From the southwestern corner—— (Interrupted.)

Q. Did you happen to observe a silver colored trailer on the premises?

A. The silver colored trailer is in between the small building I referred to and the main building.

Q. Did you find anything there that attracted your attention as the object of your search?

A. Yes.

Q. What did you find?

A. A small tobacco can was handed to me by Mr. Siler. It was found in the closet of this small building.

Q. Were you there at the time it was found?

A. I was.

Q. You were close to the closet, was you?

A. I was standing right in front of the closet door.

Q. Did you do anything with the can?

A. I placed the can on the kitchen table on the table immediately to my right.

Q. What happened then?

A. Mr. Bremer looked in the can and he took the can. He had it in his possession there on the table.

Q. Did you see either of the defendants on the

(Testimony of George M. Tweedy.)

premises at the time you were making your search, Mr. Tweedy? [129]

A. When I was taking the photographs, I saw Mrs. Wright at the Club 69.

Mr. Hepp: You may question the witness.

Cross-Examination

By Mr. Hurley:

Q. You say you saw a can found in a cabin near the 69 Club? A. That's right.

Q. And do you know who was occupying the cabin at that time? A. I do not.

Q. Did you make any investigation to find out?

A. No, I didn't.

Q. Do you know of any investigation being made to find out who was occupying the cabin?

A. I do not.

Q. You don't know anything about that?

A. No.

Q. You went out primarily to take pictures, is that right? A. That's right, sir.

Q. And did you ever go out with Marshals on any other occasions to take pictures?

A. I never been there before.

Q. I say, did you ever go out on any occasions in the [130] year—whatever you have been here—with the Marshals or any of the deputies to go out and take pictures? A. I have.

Q. How many times?

A. Six, seven times maybe.

(Testimony of George M. Tweedy.)

Q. You went out with them on—for the purpose of taking pictures? A. That's right, sir.

Q. Where did you go?

Mr. Hepp: I object to that, your Honor. I don't believe that has any bearing on this trial.

The Court: Objection sustained.

Q. (By Mr. Hurley): And did they tell you to bring your—all your paraphernalia along so could take pictures?

A. They usually request that I have my camera equipment, sir.

Q. And—— (Interrupted.)

A. I go with it all the time.

Q. Did you take pictures of a chair in this room and some cigarettes on the floor, is that right?

A. State the question again.

Q. I say, you took a picture of a chair in this room where you went in and took some pictures of some cigarettes on the floor? [131]

A. I did, sir.

Q. You didn't see who put them down there then, the cigarettes, did you? A. No.

Q. Huh? A. No.

Q. You don't know for sure who put them there?

A. I do not.

Q. But you took some pictures? A. I did.

Q. I see. And you went into a cabin that you don't know who was occupying and somebody showed you a can? A. That's right, sir.

Mr. Hurley: That's all.

Mr. Hepp: That's all, Mr. Tweedy.

(Mr. George Tweedy left the witness stand.)

Mr. Hepp: At this time, your Honor, I would like to offer into evidence government's identifications number four and—government's identification number four, your Honor, the picture describing a chair.

Mr. Hurley: I would like to see it.

Mr. Hepp: Oh, sure. (Handed photograph to Mr. Hurley.)

Mr. Hurley: No objection to that, your [132] Honor.

The Court: May be admitted.

Clerk of the Court: Plaintiff's exhibit "A."

(A photograph, showing a chair, previously received for identification, was received in evidence and marked Plaintiff's exhibit "A.")

Mr. Hepp: I offer government's identification number five (handed to Mr. Hurley).

Mr. Hurley: No objection, your Honor.

The Court: May be admitted.

Clerk of the Court: Plaintiff's exhibit "B."

(A photograph, showing a chair, previously received for identification, was received in evidence and marked Plaintiff's exhibit "B.")

Mr. Hepp: I offer government's identification number six (handed to Mr. Hurley).

Mr. Hurley: Well, we object; incompetent, irrelevant and immaterial; not properly identified

and for the reason it doesn't show anything except some squares on the floor and you can't tell anything about what it means; and for the further reason that there is no evidence to show that it is anything connected with the defendants and anything that they claim—— (Interrupted.) [133]

Mr. Hepp: Your Honor, I believe the identification—— (Interrupted.)

Mr. Hurley: I object—— (Interrupted.)

Mr. Hepp (Continuing): ——has been properly identified.

Mr. Hurley: I understand, but you did them all at once.

The Court: I will take a look at it. (Handed to Court.)

Mr. Hurley: And I don't know which one is which. There is some—supposed to be some cigarettes on there. I don't know what it is and I object to it, which they claim shows cigarettes for the reason there is no evidence of how the cigarettes got there and there is no connection between them and the defendants and I don't know what this is supposed to represent.

The Court: Objection overruled, may be admitted.

Clerk of the Court: Plaintiff's exhibit "C."

(A photograph, previously received for identification, was received in evidence and marked Plaintiff's exhibit "C.")

Mr. Hepp: I offer government's identification

number 7 into evidence, your Honor (handed [134] to Mr. Hurley).

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial; no proper foundation laid for it. I see a few cans of beer and there's nothing to show where they come in and nothing has been said about them and nothing to show that there is anything wrong with the cans of beer. They are all on the floor.

The Court: Objection overruled.

Mr. Hurley: The chair has been moved.

Clerk of the Court: Plaintiff's exhibit "D."

(A photograph, previously marked for identification, was received in evidence and marked Plaintiff's exhibit "D.")

Mr. Hepp: At this time, your Honor, I would like to offer government's identification number 8 (handed to Mr. Hurley).

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial; no proper foundation laid for its admission; nothing to show that the Marshal didn't put this little package there on the floor.

The Court: Objection overruled, may be admitted.

Clerk of the Court: Plaintiff's exhibit [135] "E."

(A photograph, previously marked for identification, was received in evidence and marked Plaintiff's exhibit "E.")

Mr. Hepp: Call Vanada Donaby.

VANADA DONABY

called as a witness in behalf of the government,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Hepp:

Q. Would you state your name to the jury, please? A. Vanada Donaby.

Q. Where do you live, Miss Donaby?

A. Seattle, Washington.

Q. How old are you? A. 23.

Q. Have you ever lived in Fairbanks, Miss Donaby? A. Yes, I have.

Q. During what period of time did you live in Fairbanks, Miss Donaby?

A. From February until August.

Q. Do you know either of the defendants? Do you know Raymond Wright? A. Yes, I do.

Q. Do you know Vernestine Wright? [136]

A. Yes, I do.

Q. Are you familiar with any premises known as the Club 69 in Fairbanks?

A. I used to live there.

Q. When did you live there, Vanada?

A. In April.

Q. For how long a period of time did you live there? A. From April to July.

Q. Were you working at the Club 69?

A. Yes, I was.

(Testimony of Vanada Donaby.)

Q. What was the nature of the work you did there? A. Prostitute.

Q. Vanada, did you—do you know what marihuana is? A. Yes, I have seen it.

Q. Did you ever see any out at the Club 69?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial; no proper foundation laid as to the time or anything else.

Mr. Hepp: Your Honor, she stated she lived out there.

The Court: You got any authority to show that would be admissible.

Mr. Hepp: Well, not on the tip of my tongue, your Honor.

The Court: I will sustain the objection. [137]

Q. (By Mr. Hepp): Vanada, did you ever hear Raymond Wright ever say anything about marihuana?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial; no proper foundation laid; no place laid or anything else. What he might have said about it doesn't have anything to do with this case. He is accused of having marihuana in his possession.

Mr. Hepp: Your Honor, this could be a foundation statement and besides, I certainly think these defendants are bound by their admissions against interest.

The Court: Well, lay the foundation for it.

Q. (By Mr. Hepp): Just "yes" or "no," did you ever hear any conversation from Mr. Wright?

(Testimony of Vanada Donaby.)

Mr. Hurley: Make the same objection.

Witness: Yes.

Mr. Hurley: Just don't answer until I object, please.

Q. (By Mr. Hepp): Who was present at the time of the conversation, Vanada? He is not going to object, just answer the question.

A. Who was present?

Q. At the time when you heard Mr. Wright make any statement [138] concerning marihuana.

A. Oh, I was present.

Q. Anybody else? A. Yes.

Q. Can you recall who?

A. Oh, Bill Jones is one.

Q. Where was this conversation—where did this conversation take place? A. Club 69.

Q. Do you recall approximately the date that it happened, Vanada? A. No, I don't.

Q. Do you know what month of the year it happened? A. No, I don't.

Q. Was it in the spring or the summer months?

A. Oh, it had to be in the spring, I suppose, between April and July.

Q. What did Mr. Wright say about anything concerning marihuana?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial; no proper foundation laid; has nothing to do with the allegations charged in this indictment, what he said in the spring of the year.

(Testimony of Vanada Donaby.)

The Court: Make your offer, Mr. Hepp. Come forward. [139]

(The following proceedings were had out of the presence and hearing of the jury:)

Mr. Hepp: I am offering to show by this witness, your Honor, that she saw marihuana out at the Club 69 and that she saw—— (Interrupted.)

The Court: Now, you have asked her for admissions of statements by Mr. Wright. You didn't ask her what she saw.

Mr. Hepp: Well, I had several objections sustained and I would like to make an offer generally as to this witness as to what she saw and how it relates to the opening statement that counsel for the defense has given.

The Court: The question right now before her is a statement of Mr. Wright.

Mr. Hepp: Well, I want—— (Interrupted.)

The Court: What do you expect to prove in that respect?

Mr. Hepp: I want to show that Mr. Wright had asked her to sell marihuana out there, to aid in the sale of it.

Mr. Hurley: I object to it, your Honor, as incompetent, irrelevant and immaterial. It has nothing to do with the charge in the indictment and it is too remote and they can't convict the defendant on some other charge. They can bring in witnesses on a dozen [140] charges, but this isn't the kind of a crime that other crimes can be proven which we

(Testimony of Vanada Donaby.)

don't have any chance to defend against. It doesn't come within that category. They say they went out there and found it on this date and that it was in his possession. But to come in to prove him guilty by other crimes is just not admissible because we have no way to defend against it. That's the general law.

The Court: Do you have any authorities to show that that would be admissible?

Mr. Hepp: I am not prepared to show any authorities, your Honor.

The Court: Offer denied.

(The following proceedings were had in the presence and hearing of the jury:)

Q. (By Mr. Hepp): Miss Donaby, while you were staying out at the Club 69, did you ever see any marihuana on the premises?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial; not within the issues of the case; doesn't ask her when she was there or when she saw or anything of the kind.

Mr. Hepp: She has already testified—— (Interrupted.)

Mr. Hurley: Doesn't have anything to do with the issues of this case. They allege that this [141] defendant was in possession of marihuana or whatever they call it when they went out there and they searched the premises. They can't prove other crimes.

The Court: Objection sustained.

(Testimony of Vanada Donaby.)

Q. (By Mr. Hepp): Miss Donaby, did you ever see Raymond Wright, the defendant, smoke marihuana?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial; has nothing to do with the issues in the case. He is not accused of smoking.

Mr. Hepp: Your Honor, I don't believe that is a crime. I don't see that the nature of his objection—— (Interrupted.)

Mr. Hurley: He is not accused of smoking. It doesn't make any difference whether he smokes or doesn't smoke.

The Court: Objection will be sustained.

Mr. Hepp: Excuse me, just a minute, your Honor. I want to refresh my memory on some notes I have (pause). I would like to withdraw this witness at this time, your Honor.

The Court: Very well.

Mr. Hepp: Unless counsel has some questions he wants to ask her concerning what she said.

Mr. Hurley: Are you going to call her [142] back?

Mr. Hepp: I may not, Mr. Hurley.

Mr. Hurley: Well—— (Interrupted.)

Mr. Hepp: So if you desire to cross-examine her, you better do so now.

Mr. Hurley: Well, I would like to ask her a few questions.

(Testimony of Vanada Donaby.)

Cross-Examination

By Mr. Hurley:

Q. You say you worked as a prostitute?

A. Yes, I did.

Mr. Hurley: That's all.

(Vanada Donaby left the witness stand.)

Mr. Hepp: Your Honor, at this time, I offer government's identification number one (handed to Mr. Hurley).

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial; for the reason that there is no evidence to show anything was ever contained in it or had any connection with any one of the defendants.

The Court: Objection overruled, may be admitted.

Clerk of the Court: Plaintiff's exhibit [143] "F."

(A brown envelope, previously marked for identification, was received in evidence and marked as Plaintiff's Exhibit "F.")

Mr. Hepp: I offer government's identification number two (handed to Mr. Hurley).

Mr. Hurley: Same objection.

The Court: Same ruling.

Clerk of the Court: Plaintiff's exhibit "G."

(A brown envelope, previously marked for identification, was received in evidence and marked as Plaintiff's Exhibit "G.")

Mr. Hepp: I offer government's identification number three, your Honor (handed to Mr. Hurley).

Mr. Hurley: Same objection, your Honor.

The Court: Same ruling.

Clerk of the Court: Plaintiff's exhibit "H."

(A brown envelope, previously marked for identification, was received in evidence and marked as Plaintiff's Exhibit "H.")

Mr. Hepp: I will rest the government's case, your Honor.

Mr. Hurley: I wonder if we can have a continuance until tomorrow morning. We can't finish the [144] case until tomorrow anyway and I am awfully tired. This is three cases in a row for me and I would like to have a little rest. We can't finish it until tomorrow afternoon, I don't think, and this is the third case in a row and I am awfully tired, your Honor, and I would like to have until ten o'clock so I can present—our case won't take long, only about half an hour or so, maybe three-quarters of an hour.

The Court: Any objection, Mr. Hepp?

Mr. Hepp: Well, I have been at more cases than Mr. Hurley, but I won't object.

Mr. Hurley: He is a lot younger than I am, too, your Honor.

The Court: You don't object to it?

Mr. Hepp: Well, if they feel they are prejudiced thereby, I am not going to object to it. I would like to get this whole thing over with.

Mr. Hurley: Can't finish it until tomorrow anyway, your Honor.

The Court: All right.

(At this point, 3:45 o'clock p.m., the court duly admonished the jury, and the trial of this cause was recessed until ten o'clock a.m., on November 9, 1950.) [145]

Be It Remembered, that upon the 9th day of November, 1950, at 10 o'clock a.m., appeared the defendants in court in person and with counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: This is the time set for continuing the trial of the United States vs. Wright, 1509 criminal. Counsel ready to proceed?

Mr. Hurley: We are ready, your Honor.

Mr. Hepp: Ready.

Mr. Hurley: If the Court please, at this time, I would like to make a motion outside of the presence of the jury.

Mr. Hepp: Your Honor, I likewise would like to make a motion outside of the hearing of the jury.

The Court: The jury will be—remain in the hallway subject to call.

(The jury left the court room.)

Mr. Hurley: May it please the Court—— (Interrupted.)

Mr. Hepp: May I just say a word, Mr. Hurley?

If I can anticipate counsel's motion, I believe mine is more timely at this time than counsel's.

The Court: Very well.

Mr. Hepp: If I can anticipate his motion, if it is the usual motion at this time of the trial [140] by a defendant.

The Court: Proceed.

Mr. Hepp: Your Honor, at this time, I would like to move that the court allow the government to reopen its case and to proceed with the evidence as was started at the time when the government rested its case and the rulings of the court compelling it to do that at that time. I have, I believe, very strong authorities to show the admissibility of the evidence that I endeavored at that time to introduce and I would like with the court's leave to present those authorities to the court at this time as an offer of that proof.

The Court: Very well.

Mr. Hurley: We object to any opening of the case and I think that if counsel knew that he was going to make a motion of this kind, he should have given us some time to prepare in regard to it.

The Court: Objection overruled.

Mr. Hurley: Save an exception.

The Court: I will give you some time if you need it.

(At this time, Mr. Hepp presented argument for permission to reopen the government's case to introduce evidence.)

(Mr. Hurley requested permission for [147] time to answer Mr. Hepp's argument and the court granted until 1 o'clock p.m.)

The Court: Call the jury.

(The jury reentered the courtroom.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

Clerk of the Court: They're all present, your Honor.

The Court: We are going to take an adjournment in a few minutes to one o'clock, ladies and gentlemen of the jury, but the jury will be excused until two o'clock.

(Whereupon, the Court duly admonished the jury and at 10:30 a.m. the trial of this cause was recessed until one o'clock p.m.)

(At one o'clock p.m. the trial of this cause was resumed.)

The Court: Counsel ready to proceed?

Mr. Hurley: Yes, we are ready, your Honor.

The Court: Very well.

(At this time, Mr. Hurley presented argument to the Court, resisting Mr. Hepp's motion to reopen [148] the government's case.)

(Mr. Hepp presented further argument in answer to Mr. Hurley's argument.)

The Court: Motion of the plaintiff will be

granted. You will open up the case and introduce your evidence along that line. We will recess until two o'clock.

Mr. Hurley: We take an exception to the court's ruling and at this time I would like to make a motion for an instructed verdict of not guilty and a judgment of acquittal for the reason that the government has failed to prove its case sufficiently to go to the jury.

The Court: Plaintiff's case isn't closed yet.

Mr. Hurley: I understand but I wanted to make the motion to preserve my right.

The Court: Motion denied.

Mr. Hurley: I will make it again.

(At this time, the trial of this cause was recessed until two p.m.)

(At two o'clock p.m. the trial of this cause was resumed.)

The Court: Call the roll of the jury. [149]

(Whereupon, the Clerk of the Court proceeded to call the roll.)

Clerk of the Court: They're all present, your Honor.

The Court: Plaintiff's case has been reopened with the permission of the court. You may proceed, Mr. Hepp.

Mr. Hepp: Call Vanada Donaby, please.

VANADA DONABY

recalled as a witness in behalf of the government,
having been previously sworn, testified as follows:

Redirect Examination

By Mr. Hepp:

Q. To reintroduce yourself, would you state your name again please? A. Vanada Donaby.

Q. I believe you stated yesterday while you were on the stand that you had lived at the Club 69?

A. Yes, I did.

Q. Would you state whether or not you knew the defendants, Raymond Wright or Vernestine Wright? A. Yes, I did.

Q. What did you say in that regard?

A. I said that I knew them. [150]

Q. How long did you live at the Club 69, Vanada?

A. From April until July the 29th.

The Court: What year?

Witness: This year, '50.

Q. (By Mr. Hepp): By living there, what—did you take your meals there, Vanada?

A. Beg pardon?

Q. I say, by your statement of living there, do you mean—did you take your meals there at the Club 69? A. Yes, I did.

Q. Did you sleep there? A. Yes, I did.

Q. Did you spend the major portion of your time in any 24-hour day at the Club 69?

A. Yes, I did.

Q. I believe you stated yesterday, Miss Donaby,

(Testimony of Vanada Donaby.)

that you know what marijuana was, is that right?

A. Yes, I did.

Q. Did you ever see any marijuana on the premises of the Club 69?

Mr. Hurley: Just a minute, we object to that as incompetent, irrelevant and immaterial; not within the issues of the case and for the further reason it is an attempt to prove a separate and distinct crime [151] from that charged in the indictment.

The Court: Objection overruled.

Q. (By Mr. Hepp): Would you answer the question, Vanada? A. Yes, I have.

Q. Did you ever see—I will withdraw that part of the question. Do you know where Raymond Wright lived during the period of time that you lived out at the Club 69? A. Yes, I do.

Q. Where did he live?

A. He lived at the trailer, silver colored trailer.

Q. Where is that in relation—where is the silver colored trailer?

A. It is right by the Club; Club 69.

Q. Did you ever see him inside the Club 69 during that period? A. Yes, I did.

Q. Would you state how often or when you saw him there, Vanada?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial; no proper foundation laid.

The Court: Objection overruled.

Witness: Quite often. [152]

(Testimony of Vanada Donaby.)

Q. (By Mr. Hepp): Do you know where Vernestine Wright lived while you were there at the Club 69?

Mr. Hurley: Same objection.

The Court: Objection overruled.

Witness: In the silver colored trailer.

Q. (By Mr. Hepp): Is that the same trailer that Raymond Wright lived in, Vanada?

A. Yes, it is.

Q. Did you have occasion to see Mr. Wright every day or nearly every day during the time that you stayed there at Club 69?

Mr. Hurley: We object to that as leading and suggestive; incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Witness: Yes, I did.

Q. (By Mr. Hepp): Did you ever see the defendant, Raymond Wright, have any marijuana while he was at the Club 69?

Mr. Hurley: Same objection, incompetent, irrelevant and immaterial; no proper foundation laid; an attempt to prove a crime other than what is charged in the indictment.

The Court: I think you should show what place the defendant Wright was in. [153]

Mr. Hepp: I beg your pardon?

The Court: What place was the defendant, Wright?

Mr. Hepp: I asked when he was at the Club 69, I believe, your Honor. I will have—I would be glad to have the reporter read the question.

(Testimony of Vanada Donaby.)

(The reporter read the question as follows:
“Q. Did you ever see the defendant, Raymond Wright, have any marijuana while he was at the Club 69?”)

The Court: I thought you said “while you were at the Club 69.” All right, go ahead.

Q. (By Mr. Hepp): Would you answer the question, Miss Donaby? A. Yes, I did.

Q. Did you ever see the defendant, Raymond Wright, ever smoke any marijuana while he was at the Club 69?

Mr. Hurley: We object to that, if the Court please.

The Court: Objection overruled.

Q. (By Mr. Hepp): Would you answer the question, please? A. Yes, I have.

Q. Did you ever see any sales made at the—of any sales of marijuana made at the Club 69?

Mr. Hurley: We object to that as [154] incompetent, irrelevant and immaterial, not within the issues; attempt to prove something that is not charged in the indictment.

The Court: Objection overruled.

Q. (By Mr. Hepp): Would you answer the question please? A. Yes, I have.

Q. Who did you see sell marijuana at the Club 69 premises, Vanada?

Mr. Hurley: Same objection.

The Court: Same ruling.

Witness: Vernestine. Vernestine and Raymond.

Q. (By Mr. Hepp): You have seen both of

(Testimony of Vanada Donaby.)

them sell marijuana there? A. Yes, I have.

Q. Had those sales been numerous or very few?

Mr. Hurley: We object to that as calling for a conclusion and incompetent, irrelevant and immaterial and for the same reason as before stated.

The Court: I think you should show when this was.

Q. (By Mr. Hepp): When did you see the sales made—— (Interrupted.)

Mr. Hurley: We object to that, if the [155] Court please.

Mr. Hepp (Continuing question): ——that you have testified—— (Interrupted.)

Mr. Hurley: Incompetent, irrelevant and immaterial, not within the issues—— (Interrupted.)

Mr. Hepp: I would like, your Honor, to instruct Mr. Hurley to allow me to finish a question before he raises his objection.

Mr. Hurley: I am afraid she's going to answer before—— (Interrupted.)

The Court: What was the question? What was the question?

Mr. Hurley: I don't want to get my objection in too late, that's all.

Mr. Hepp: I don't believe I still have finished my question.

Mr. Hurley: Well, go ahead.

Q. (By Mr. Hepp): When the sales were made that you were referring to in your last statement, Miss Donaby, when were those sales made?

(Testimony of Vanada Donaby.)

Mr. Hurley: Same objection as before, your Honor.

The Court: Objection overruled.

Witness: I don't remember the exact [156] date but it was made between the time I was living there.

Q. (By Mr. Hepp): And that was what dates again, please?

A. From the first—some part of April until the 29th of July.

Q. And which—of this year? A. '50, 1950.

Q. That is this present year, is it?

A. Yes, it is.

Q. Do you know who managed the Club 69 while you were working there, Miss Donaby?

A. Raymond Wright and Vernestine.

Q. Did each of them give you instructions concerning your work?

Mr. Hurley: We object to that as leading and suggestive; not within the issues.

The Court: Objection overruled.

Witness: Yes.

Mr. Hepp: You may question the witness.

Recross-Examination

By Mr. Hurley:

Q. Where were you on the 4th day of August, 1950?

A. (Pause.) I don't remember. I think I was here.

(Testimony of Vanada Donaby.)

Q. Where? [157]

A. Here at the jail.

Q. Where? A. Here.

Q. What do you mean by here?

A. Here at the jail.

Q. What were you doing in jail?

A. I was held here for protection.

Q. You were in jail?

A. No, I wasn't in jail.

Q. You weren't? Where were you on the 4th of August, 1950? A. I was here.

Q. Whereabouts? A. Downstairs in jail.

Q. In jail? A. Uh-huh.

Q. And did you make an affidavit for a search warrant while you were in jail?

A. Oh, I don't know.

Q. You don't know? A. No, I don't.

Q. You don't?

Mr. Hepp: Your Honor, I am going to object to that and move that that answer be stricken because there is no proper foundation that this witness would know [158] what she made an affidavit for or anything and I don't believe that the question was sufficiently clear to enable this witness to answer.

The Court: May be stricken. I don't see the relevancy of it any way.

Mr. Hurley: Save an exception. I think it has a bearing—this is in connection with my objection, your Honor—I think it has a bearing on the testimony of the deputies that testified that they didn't

(Testimony of Vanada Donaby.)

know who made the affidavit for the search warrant and she testified she was in jail and I happen to know that she signed the affidavit. I think I have a right to show who got her to sign it in order to show what happened in connection with the search warrant. That is the purpose of my question.

The Court: You didn't lay any foundation for impeaching any deputy marshal on that subject.

Mr. Hurley: It isn't a question of impeaching.

The Court: I will sustain the objection.

Mr. Hurley: Save an exception.

Q. (By Mr. Hurley): And how long were you in jail after the 4th day of August, 1950?

Mr. Hepp: I object to that question. [159] I don't think there is any evidence that she was in jail. She says she was at the jail.

Mr. Hurley: She said she was in jail.

Mr. Hepp: She said here in Fairbanks at the jail.

Mr. Hurley: She said she was in jail. I think the District Attorney knows she was.

The Court: I don't know what she said myself.

Witness: I said I was held in jail for protection.

Q. (By Mr. Hurley): You were in jail, is that right? I don't care about the protection part of it. You were in jail, is that right?

A. Yes, I was here.

Q. In jail? A. Yes.

Q. Yes. And how long after the 4th day of August was it before you were let out?

A. I don't remember.

(Testimony of Vanada Donaby.)

Q. What? A. I don't remember.

Q. You don't remember? No idea how long you were in jail? A. I don't remember. [160]

Q. You don't remember how long you was in jail? A. No, I don't.

Q. You don't remember anything, do you?

A. What I remember, I say so.

Q. How many times you have been in jail?

A. I have never been in jail.

Q. Before?

Mr. Hepp: Is that a question, Mr. Hurley?

Q. (By Mr. Hurley): I say, you have never been in jail? A. No, I haven't.

Q. What?

A. No, I haven't never been arrested.

Q. Where did you sleep on the 4th day of August? Answer the question. Don't look at him.

Mr. Hepp: What was the question, Mr. Hurley?

Q. (By Mr. Hurley): I say, where did you sleep on the 4th day of August? A. In jail.

Q. Yes. And that is the first time you ever slept in jail, is it? A. Yes, it was.

Q. And you don't remember how long you was there? [161]

A. No, I don't.

Q. No idea?

A. No, I don't have no idea. It wasn't very long.

Q. You don't have any idea how long you were in jail?

(Testimony of Vanada Donaby.)

The Court: She just answered you it wasn't very long.

Q. (By Mr. Hurley): How long?

A. I don't know how long. It wasn't very long.

Q. How long after the 4th day of August was it?

Mr. Hepp: I object to that. He's asked that question two or three times.

The Court: Objection sustained.

Mr. Hurley: A person who has never been in jail before ought to know when they get out.

Mr. Hepp: Counsel is just trying to make her guess at a date and try to say she is wilfully false in it.

The Court: I will sustain the objection, Mr. Hurley.

Mr. Hurley: Oh, alright.

Q. (By Mr. Hurley): And did you get out on the 5th of August or the 6th? You don't have any idea?

A. I don't remember. [162]

Q. What day did you leave the 29 Club?

A. I don't know anything about the 29 Club?

Q. I mean the 69 Club.

A. The 29th of July.

Q. You remember that day exactly?

A. Of course, I do. That day was easy to remember.

Q. But in jail you can't remember when you went there and when you got out, is that right?

A. In jail I was no prisoner.

Q. I didn't ask you if you was a prisoner. I say, you can't remember when you went to jail

(Testimony of Vanada Donaby.)

and you can't remember when you got out, but you remember when you left the 69 Club, the exact day?

A. Well, that was easy to remember.

Q. Uh-huh?

A. That's like being in the pen.

Q. Being in jail was harder treatment, wasn't it?

Mr. Hepp: I am going to object to further questions on that subject.

Mr. Hurley: I am going to quit right now.

The Court: Objection is sustained.

Mr. Hurley: I say I quit right now. I give up. That's all. Oh, just one other question I want [163] to ask you.

Q. (By Mr. Hurley): Who did you see either of the defendants sell marijuana to?

A. Oh, I don't know the people.

Q. Have you ever given any description of them to the marshals?

A. I don't remember. I don't know.

Q. How many—how much did you see them sell?

A. I don't remember.

Q. And how did they sell it? What did it consist of?

A. Oh, like a cigarette, rolled like a cigarette.

Q. And you didn't see anybody smoke any of them, did you? A. Yes, I did.

Q. Did you smoke any? A. Yes.

Q. You did? A. Uh-huh.

Q. You smoked them? A. Yes, I have.

Q. What? A. Yes, I have.

Q. How long have you been an addict?

(Testimony of Vanada Donaby.)

Mr. Hepp: I object to that, your Honor. There is no evidence that this girl is an addict.

Mr. Hurley: Well then, I'll put the [164] question this way.

Q. (By Mr. Hurley): How long have you been smoking marijuana cigarettes?

A. Oh, I tried it out at the Club 69.

Q. And do you know a man by the name of "W.O.," who is referred to as "W.O."?

A. I know lot of people by that initial. I can't recall the name.

Q. You don't remember? Do you remember a man down in California that went by that name that you were living with?

Mr. Hepp: I object to that, your Honor. There is no evidence that this girl was ever in California and that she was living with anybody, with anybody by the name of "W.O."

The Court: I will sustain—— (Interrupted.)

Mr. Hurley: Alright. I will ask her this way.

Q. (By Mr. Hurley): Did you know a man in California that went by the name of "W.O."?

A. No.

Q. You didn't—or in Washington, I mean?

A. No.

Q. You didn't know any such man?

A. No, I didn't. [165]

Q. And did you ever know a man by that name who was dealing in drugs?

Mr. Hepp: I object to that. She said she didn't

(Testimony of Vanada Donaby.)

know any man by that name. Counsel is trying to get prejudicial matters—— (Interrupted.)

The Court: Objection sustained.

Q. (By Mr. Hurley): I will ask you if it isn't a fact that while you were out at the 69 Club that you told a colored girl by the name of Willa May Walters that you were living with a man known by the name of "W.O." and that he was convicted of dealing in narcotics—— (Interrupted.)

Mr. Hepp: Don't answer that question.

Q. (By Mr. Hurley): (Continuing): ——and that the F.B.I. questioned you about it?

Mr. Hepp: Don't answer the question. Now, I object to that, your Honor. There is no foundation showing the relevancy to this trial. It brings in a collateral issue. If he is trying to introduce that kind of evidence to impeach this witness, I don't think that this witness is a proper witness to do that with and it is inadmissible for other grounds that it has no bearing on the issues of this case or deals with this girl's testimony.

The Court: I will sustain the objection. [166]

Mr. Hurley: Save an exception.

Q. (By Mr. Hurley): And do you know a girl by the name of Willa May Walters?

A. Yes, I do.

Q. And did you ever talk with her?

Mr. Hepp: I object to that, your Honor, unless they can show any conversation with her. It wouldn't be admissible here.

The Court: Objection is sustained. The question is too general.

Mr. Hurley: Save an exception. I think that's all.

Mr. Hepp: That's all.

The Court: That's all then.

(The witness left the stand.)

Mr. Hepp: Call William Jones please.

WILLIAM JONES

called as a witness in behalf of the government,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Hepp:

Q. Would you state your name to the jury please? A. William Jones. [167]

Q. Where do you live, Mr. Jones?

A. Los Angeles, California.

Q. How old are you, Mr. Jones?

A. 40.

Q. Are you married? A. Yes, sir.

Q. Do you have a family? A. I do.

Q. Did you ever live in Fairbanks, Mr. Jones?

A. Yes, sir.

Q. During what period of time did you live in Fairbanks, Mr. Jones?

A. From the 30th of May until the 5th of August.

Q. Do you know the defendant, Raymond Wright? A. I do.

Q. Do you know the other defendants, Vernes-tine Wright? A. I do.

(Testimony of William Jones.)

Q. How long have you known Mr. Wright?

A. I would judge oh about the 10th or the 15th of June.

Q. Since—you say you have known him since that date? A. That's right.

Q. How long have you known the defendant, Vernestine Wright?

A. The same length of time.

Q. Are you familiar with the premises of the Club 6— [168] known as the Club 69?

A. I am.

Q. Have you ever been at the premises of the— at the Club 69? A. I have.

Q. When were you first there, Mr. Jones?

A. Around about the 10th or 15th of June.

Q. What was the occasion of your being there then?

A. Speaking to Mr. Wright concerning some plumbing.

Q. Did you ever enter into any business relationship with Mr. Wright? A. Yes, sir.

Q. What sort of arrangement was that?

A. Plumbing and—— (Interrupted.)

Q. And where was this plumbing to be done?

A. At his new home on—I think 23rd avenue—and also at Club 69. I did work there too.

Q. Where did you live during the period of time that you were in Fairbanks?

A. 801 21st street, 21st avenue.

Q. During the time that you knew Mr. Wright, that is to say, from the 10th to the 15th of June

(Testimony of William Jones.)

until the 5th of August when you say you left, did you have occasion to go out to the Club 69 many times or a few times? Would you just make some statement concerning that? [169]

A. The only time was when I was doing the work out there when I talked to him about doing the other job at 23rd avenue.

Q. Approximately how many days did you work out at the Club 69?

A. I would judge around 7 or 10 days.

Q. That was this summer just last past?

A. That's right.

Q. Mr. Jones, do you know what marijuana is?

A. Well, I have never used it but I know what it is like.

Q. Have you ever seen any marijuana on the premises of the Club 69?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial and—— (Interrupted.)

Witness: Yes, sir.

Mr. Hurley: Just a minute. Wait until I object; as incompetent, irrelevant and immaterial; not within the issues of the case and an attempt to prove some crime that is not charged in the indictment.

The Court: Can you show the time he is speaking of?

Mr. Hepp: I would like to lay a foundation for that then, your Honor and just ask for a yes or no on this answer.

(Testimony of William Jones.)

The Court: Alright, I will overrule [170] the objection. Fix the time.

Q. (By Mr. Hepp): Just "yes" or "no." Just answer that "yes" or "no," Mr. Jones.

A. Will you repeat that again?

Q. Have you ever seen any marijuana on the premises of the Club 69? Just "yes" or "no."

A. Yes.

Mr. Hurley: Same objection.

The Court: Same ruling.

Mr. Hurley: For the further reason that the witness has not shown himself to be qualified to answer the question.

The Court: Read what Mr. Hurley just said please.

(Mr. Hurley's last statement was read to the court by the reporter.)

The Court: It would be well to qualify the witness more in that respect.

Mr. Hepp: Your Honor, I can only ask a person if he knows what a substance is and if he says "yes," why, I don't know—I don't know how else to qualify him as to that.

The Court: Very well then. I will sustain the objection. [171]

Mr. Hurley: I move that the jury be instructed to disregard his testimony that he has already gotten in before I could make the objection.

The Court: Well, if you will tell me just what words you want stricken or the reporter—— (Interrupted.)

(Testimony of William Jones.)

Mr. Hurley: Well, his answers to the questions. He didn't—his answers to the questions he got in. He didn't give me a chance to object. He said he knew and said that there was and saw on—— (Interrupted.)

Mr. Hepp: Your Honor, I don't believe Mr. Hurley objected to his answer when he says—— (Interrupted.)

Mr. Hurley: No, he got it in before I got a chance to.

Mr. Hepp: No. That was the following question, your Honor.

The Court: I don't know what you wish stricken.

Mr. Hurley: I want his answer stricken in regard to narcotics, that he knew that there were narcotics out there.

The Court: The answer that he knew—— (Interrupted.)

Mr. Hurley: Nothing to show that he knows.

The Court: I can't tell just what you [172] want, Mr. Hurley.

Mr. Hurley: I want to strike out his answers when he said that there was narcotics out at the 69 Club.

The Court: Alright. I will strike it.

Mr. Hurley: And I want the jury not to consider it.

The Court: I have a general instruction they are not to consider any evidence that is stricken.

Mr. Hurley: I understand, your Honor.

Q. (By Mr. Hepp): Mr. Jones, during the

(Testimony of William Jones.)

dates that you have stated that you knew Mr. Wright, did you ever hear him make any statement to you concerning marijuana?

Mr. Hurley: Now, we object to that unless they show the place and the time and who was present.

Q. (By Mr. Hepp): Well, just "yes" or "no" please. Wait until the court rules.

The Court: Very well. I will overrule the objection on that.

Q. (By Mr. Hepp): Just "yes" or "no" please.

A. Yes. [173]

Q. And where did this conversation take place?

A. The Club 69.

Q. Do you recall the people that were present at the time, Mr. Jones?

A. Some of them I do.

Q. Would you state who they were?

A. Well, Willa May, Oliver—— (Pause.)

Q. Go ahead, answer the question.

A. And another young man by the name of Ripley and Raymond.

Q. And when was this conversation?

A. To be sure, I think it was on the night of the 4th of July.

Q. What did Mr. Wright say in regard to the marijuana?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial; no proper foundation laid; an attempt to prove something that is not within the issues and too remote.

The Court: Objection overruled.

(Testimony of William Jones.)

Q. (By Mr. Hepp): What was the conversation, Mr. Jones?

A. Well, everybody naturally was feeling good on the 4th of July—— (Interrupted.)

Mr. Hurley: I move that that part of the answer be stricken out and the witness be instructed to answer the question. [174]

The Court: Alright. I will strike it. Give an answer direct to the question.

Witness: Well, I was offered marijuana cigarettes—— (Interrupted.)

Mr. Hurley: Now, we move that that be stricken out as not responsive to the question.

The Court: May be stricken.

Q. (By Mr. Hepp): Mr. Jones, just testify as to what was said there at that conversation. That is what we are talking about I believe.

A. Well, at that time—I am trying to explain myself so—— (Interrupted.)

Q. Well, you have to just answer each question at a time. Now we have been discussing the matter of a conversation that you have heard—you testified you heard Mr. Wright make a statement regarding marijuana here at the Club 69 on the evening of the 4th of July I believe you said. Now, what was that statement or conversation that you heard Mr. Wright make concerning marijuana?

A. The only statement I recall is when he passed it out to me and everybody else was smoking in there.

Q. Did he make a statement offering it to you?

(Testimony of William Jones.)

A. Oh, yeah. He offered me one and I told him I didn't care to smoke that. [175]

Mr. Hurley: I move that the answer be stricken out, incompetent, irrelevant and immaterial; no proper foundation laid; nothing to show what—that he knows what marijuana is or anything else.

Mr. Hepp: Your Honor, it is a little late for the kind—for that kind of an objection. He didn't object before.

Mr. Hurley: Well—— (Interrupted.)

The Court: Objection is overruled.

Mr. Hurley: He didn't respond to the question.

Q. (By Mr. Hepp): Was Mrs. Wright present at that occasion?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial. He's already testified who was present; leading and suggestive.

The Court: Objection overruled.

Q. (By Mr. Hepp): Would you answer the question? A. Yes, she was.

Q. Mr. Jones, just "yes" or "no," did you ever have any conversation with—in which Mr. Wright the defendant made any statement to you concerning any other business proposition?

A. Yes.

Mr. Hurley: We object to that—just [176] a minute—we object to that as incompetent, irrelevant and immaterial; not within the issues of the case.

The Court: Well of course, right away I can't

(Testimony of William Jones.)

see what—I can't see the relevancy of the—— (Interrupted.)

Mr. Hepp: I believe I can tie that in, your Honor.

The Court: Can you make it relevant in itself?

Mr. Hepp: Yes, I can.

The Court: Very well.

Mr. Hepp: Do you desire me to ask another question—— (Interrupted.)

The Court: If you make it relevant, you can ask him another question.

Q. (By Mr. Hepp): Mr. Jones, did you ever have a conversation with Mr. Wright concerning a business venture involving marijuana?

A. I did.

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial; not proper evidence under the indictment; an attempt to prove something that is impossible for the defendant to defend against and something of which he is not accused.

The Court: You will fix the time of [177] that, will you?

Mr. Hepp: I will endeavor to do so your Honor.

The Court: Objection overruled.

Q. (By Mr. Hepp): When was this conversation, Mr. Jones?

A. To know the day, I couldn't tell you the day.

Q. Can you state the week or the month and the year? A. Yes, sir.

Q. Would you state as close as you can the date?

(Testimony of William Jones.)

A. It was in July between I would say the 15th and the first of August.

Q. Where did this conversation take place?

A. Out at the Club 69.

Q. Who was present at that conversation?

A. Well, he and I were just standing off together talking.

Q. What did he say regarding that business?

Mr. Hurley: Same objection, your Honor.

The Court: Same ruling.

Q. (By Mr. Hepp): Just state what he said concerning that.

A. Oh, he showed me the point where I was too nice a fellow to continue on with plumbing, I could lay my tools down and make more money and be neat and clean and if I would string [178] along with him with his marijuana and not only that, he—I told him I would like to come to Alaska here in Fairbanks and make it my home and I was sort of disappointed on the Negro population here to venture out from California to come here and start a business, but he showed me where I could do better with him than by going at my trade and he made several suggestions and offers to me, like giving me a lot and the deed to it; furnishing me all the lumber and material to build a home and I mentioned that to my sister-in-law but I had no intentions of ever doing a thing like that with Mr. Wright or anyone else. And he had me to understand he would have a man over in a few more days that would take over.

Q. A man?

(Testimony of William Jones.)

A. A man by the name of Elger Fields better, known as Tam. And—— (Interrupted.)

Q. Better known as who?

A. Tam. T-A-M. He's the one that has been—— (Interrupted.)

Mr. Hurley: Now—— (Interrupted.)

Mr. Hepp: Just a minute.

Mr. Hurley: We object to that if the Court please. This man will talk all day if we don't stop him.

Q. (By Mr. Hepp): Did you take Mr. Wright up on his proposition? A. No, I didn't. [179]

Q. Just "yes" or "no," Mr. Jones, did you ever see any marijuana on the premises of the Club 69?

Mr. Hurley: Same objection as we made before.

The Court: Same ruling.

Mr. Hurley: Until he shows the witness is qualified, no foundation laid.

The Court: That's correct. I will sustain the objection until he shows that he is qualified to answer it.

Q. (By Mr. Hepp): How many—would you state again how many days you were at the Club 69?

A. I would say between 7 to 10 days I worked there and the evenings after my regular job.

Q. Seven to ten days? A. Yes, sir.

Q. Were you—did you have access to the premises of the Club 69?

A. Well, anywhere I wanted to go I had my—— (Interrupted.)

Q. I didn't quite understand—— (Interrupted.)

(Testimony of William Jones.)

A. I said every time, anywhere on the outside, where I wanted to go to cut my pipes, drill them.

Q. Were you working—where were you working?

A. I was working at Weeks Field in the daytime. [180]

Q. Where were you working at the premises of the Club 69, Mr. Jones?

A. Well, I was installing a complete bath there.

Q. Is that inside the building proper?

A. Inside the Club 69.

Q. Did you have occasion to go through the premises, the building structure of the Club 69 while you worked out there, Mr. Jones?

A. Well, only where the club was and into that room. I had no other reason to go any other place in there.

Q. While you were in the Club 69, did you ever see any marijuana?

Mr. Hurley: Just a minute. We object to that as incompetent, irrelevant and immaterial; no proper foundation laid; nothing to show that he is qualified to answer and an attempt to prove other crimes not charged in the indictment.

Mr. Hepp: Your Honor, I believe I laid a foundation to show that he was there. He could have seen—I suppose I can ask him if his sight is good.

The Court: Well, he testified before to see the defendant pass around something that the defendant said was marijuana, didn't he?

Mr. Hepp: Yes.

(Testimony of William Jones.)

The Court: Admissions against interest [181] are evidence.

Mr. Hepp: That is the purpose of this question, your Honor, showing an admission against interest.

The Court: The objection is you haven't shown that this man knows what marijuana is.

Mr. Hepp: I have asked him that question, your Honor, and I don't believe that was counsel's objection and he stated that he did and that was not over the objection of counsel and—— (Interrupted.)

Mr. Hurley: The objection is in the record. I think I can prove that.

The Court: A conclusion should come after showing some facts.

Q. (By Mr. Hepp): Mr. Jones, how old are—how old did you say you were? A. 40.

Q. In the course of your lifetime, have you ever had occasion to see any substance that you—was told to be marijuana? A. Yes, sir.

Q. Did you have occasion to examine it or an opportunity to examine it?

A. Well, I have seen it in cigarette form and when it is in bulk, you know. [182]

Q. Did you acquire a test in your own mind that would enable you to recognize it again when you examined it this time or these times that you have testified? A. Yes.

Q. Could you now recognize marijuana?

A. If I see it, I could.

(Testimony of William Jones.)

Q. And that is as a result of your having seen it before, is that right?

A. That's right.

Q. Did you ever see any marijuana on the premises of the Club 69?

Mr. Hurley: We make the same objection we made before; nothing to show that the witness is qualified to answer; incompetent, irrelevant and immaterial and an attempt to prove something other than the allegations charged in the indictment; just a mere conclusion on the part of the witness.

The Court: I will overrule the objection.

Mr. Hepp: I will withdraw the question, your Honor. Counsel may question the witness. Oh, just a minute. One more question.

Q. (By Mr. Hepp): During the time, Mr. Jones, that you knew Raymond Wright, do you know where he lived? A. Yes. [183]

Q. Where did he live?

A. Out at the Club 69 in the house trailer.

Q. Do you know—during the time that you knew Vernestine Wright, where did she live?

A. Same place.

Q. And that is from—what—during what dates again, Mr. Jones?

A. I say around 12th of June until the 5th of August.

Q. You stated that you had installed some plumbing out there at the Club 69? A. I did.

Q. And who instructed you as to what installations to make? A. Mr. Wright.

(Testimony of William Jones.)

Mr. Hepp: That's all. You may question the witness.

Cross-Examination

By Mr. Hurley:

Q. Mr. Jones, you say you live in Los Angeles?

A. That's right.

Q. How long have you lived there?

A. Oh—in Los Angeles?

Q. Yes.

A. Oh, I would say about four years. [184]

Q. Where did you live before that?

A. I lived in Oakland.

Q. What? A. Oakland.

Q. How long did you live there?

A. Three years.

Q. Where did you live before that?

A. In New York.

Q. How long did you live there?

A. I was born in New York.

Q. And you are what is known as a colored man, are you not? A. I guess so.

Q. Where were you on the 4th day of August of this year, Mr. Jones?

A. 4th day of August? Downstairs in the jail.

Q. And when did you get out?

Mr. Hepp: I object to any further questioning unless counsel can show its relevancy here to this trial. We are going to start on another time consuming banter like we had before.

The Court: Objection will be overruled.

(Testimony of William Jones.)

Q. (By Mr. Hurley): And do you know Van-
ada Donaby? A. I do. [185]

Q. She is a colored girl, isn't she?

A. That's right.

Q. Where was she on the 4th day of August?

Mr. Hepp: I object to that. There is no evidence here—no foundation that this witness knows—
(Interrupted.)

Q. (By Mr. Hurley): Well do you know whether or not she was—where she was?

The Court: Objection is sustained.

Q. (By Mr. Hurley): Did she get out of jail the same time you did?

Mr. Hepp: I object to that, your Honor; calling for a conclusion as assuming things not in evidence.

Mr. Hurley: She can't remember when she got out. I thought maybe he might know.

Mr. Hepp: I object to counsel making these statements here.

The Court: It's not cross-examination, Mr. Hurley, at all. Objection sustained.

Q. (By Mr. Hurley): What were you in jail for?

A. Well, for some charge that Mr. Wright trumped up that we had stolen a safe from him.

Q. What? [186]

A. I said for a charge that Mr. Wright had trumped up saying that we had stolen a safe in order to bring us back up from the Canadian border.

Q. How long were you in jail?

(Testimony of William Jones.)

A. Oh, from the 30th or 31st until the 5th of August.

Q. And you got that case dismissed, did you not?

A. I left here on the 5th of August.

Q. I say, you got the case dismissed before you left, is that right? A. It was pending.

Q. What? A. It was pending.

Q. When you left? A. Yes, sir.

Q. But you knew it was going to be dismissed, didn't you?

Mr. Hepp: I object to that, your Honor.

Witness: No.

Q. (By Mr. Hurley): I say, did you know it was going to be dismissed when you left?

A. No.

Q. Were you ever called back in connection with that case in which you were charged with stealing money from Mr. Wright?

A. Will you repeat that? [187]

Q. I say, were you ever brought back on that charge that Mr. Wright made against you for stealing money from him?

A. Well, I came back up here to—I was subpoenaed to come back here to trial and that case was brought up here and it was thrown out on the lack of evidence.

Q. You mean it was dismissed, don't you?

A. Well, dismissed for lack of evidence.

Q. You don't know whether it was lack of evidence or what it was, do you?

A. Well, it was on my—— (Interrupted.)

(Testimony of William Jones.)

Q. I say it was dismissed on the motion of the United States Attorney, wasn't it?

Mr. Hepp: Now, I object to that. There is no evidence of that anyway.

Mr. Hurley: I am asking if that is what happened.

The Court: Just a minute. I will sustain the objection. You know how to find out those things; not necessarily in the knowledge of this witness at all.

Mr. Hurley: I thought maybe he might know.

Q. (By Mr. Hurley): Did you ever use marijuana? A. No, I haven't. [188]

Q. Never smoked it? A. No.

Q. How many times have you seen marijuana?

A. Oh, I have seen it any number of times.

Q. Where? A. In Los Angeles.

Q. Yeah? A. Yes.

Q. You were with people that used it, were you?

A. No. I have seen people that used it.

Q. I say, you were around with people—— (Interrupted.)

A. Naturally. If you're going into any recreation center, a pool room or something, you see people—some fellow that will smoke and where others won't.

Q. Lot of people use it, do they?

A. Oh—— (Interrupted.)

Mr. Hepp: I object to that. There is no evidence that this witness knows how many people smoke marijuana.

(Testimony of William Jones.)

The Court: Objection overruled.

Mr. Hurley: He says he knows something about it.

Q. (By Mr. Hurley): A good many colored people use it, don't they?

A. Well, I don't think I am being tried for what happens [189] in the states.

Q. Just answer the question.

A. I gave you my answer.

Q. I asked you do many colored people use it, or—— (Interrupted.)

Mr. Hepp: I object to that, your Honor—— (Interrupted.)

Q. (By Mr. Hurley) (Continuing): ——or do you know of many that do use—— (Interrupted.)

Mr. Hepp: Just a minute, Mr. Hurley. I object to that. There is no foundation shown that this witness knows how many colored people smoke marijuana and that's an absurd question.

The Court: Objection sustained.

Q. (By Mr. Hurley): How many people have you seen using marijuana?

A. Oh, I can count them all on one hand.

Q. How do they use it?

A. Smoked it.

Q. In what? Not rolled as a cigarette?

A. That's right.

Q. Did you ever open the cigarettes to examine the contents?

A. I have seen people roll them up before smoking. I have never—— (Interrupted.) [190]

(Testimony of William Jones.)

Q. How many?

A. Oh, I had seen two different fellows roll them.

Q. And what did they have it in when they rolled them?

A. Have it in a paper.

Q. Yes, but how did they get it into the paper?

A. How did they get it in?

Q. Yes.

A. How would you roll a Prince Albert or Bull Durham?

Q. I don't know! I am asking you. How would they get it into the paper?

A. Just take it in their hand, put it in and roll it up.

Q. Where would they get it?

A. Out of their pocket or bag; anything that they would have it in; tin can.

Q. But what did they have when you saw them?

A. Well, are you speaking here in Alaska?

Q. I am talking about when you saw them rolling cigarettes. What did they have it in?

A. Different sorts—— (Interrupted.)

Q. The ones that you saw?

A. Well, I have seen them take it out of their handkerchiefs and roll one of those cigarettes.

Q. How many out of handkerchiefs?—— (Interrupted.)

A. How many what?

Q. Did you see take marijuana out of handkerchiefs? [191]

(Testimony of William Jones.)

A. I have seen one fellow do it.

Q. And what else did you see them take it out of?

A. I never seen that fellow take it out of——
(Interrupted.)

Q. I wasn't asking you about that fellow. I was asking you who else you saw take—— (Interrupted.)

A. I saw Elger Fields take it out of a newspaper and roll it.

Q. Out of a newspaper? A. Oh, yes.

Q. And who else did you see take some?

A. That's all I ever seen.

Q. That's the only two people you ever saw roll cigarettes out of marijuana? A. Yeah.

Q. I see. One took it out of a newspaper and the other took—— (Interrupted.)

Mr. Hepp: I object to that—— (Interrupted.)

Q. By Mr. Hurley, continuing): ——the other took it out of a handkerchief, is that right?

Mr. Hepp (Continuing): ——as repetitious. He has—— (Interrupted.)

The Court: Objection sustained.

Mr. Hurley: Save an exception. [192]

Q. (By Mr. Hurley): And you said you saw the defendant have some marijuana in cigarettes?

A. That's right.

Q. How do you know it was marijuana in the cigarettes?

A. How did I know? I could tell from the smell of it.

(Testimony of William Jones.)

Q. Oh, you could? A. Oh, yes.

Q. Huh? A. Yes.

Q. And who smoked them?

A. Well, I mentioned before just how many people I seen smoking here, smoking that marijuana.

Q. Just answer the question, just answer the question. A. Ask it again please.

Q. Who did you see smoke them here?

A. I saw—like I mentioned before—Willa May.

Q. Willa May who?

A. I don't know the girl's last name, but she is here in the courtroom.

Q. Yes? A. I saw Mr. Wright smoke it.

Q. Yes? A. I saw Oliver smoke it.

Q. Who?

A. Another young men by the name of [193] Oliver.

Q. Do you know what his last name is?

A. No, I don't.

Q. He is a colored man? A. Yes.

Q. Who else?

A. And another young man by the name of Ripley.

Q. Ripley? Is he a colored man? A. Yes.

Q. Who else?

A. That's all I ever seen smoke here.

Q. That's all you ever saw?

A. Yeah.

Q. Now, you say Mr. Wright—how many days were you out there working?

(Testimony of William Jones.)

A. I said in the neighborhood of 7 to 10 days.

Q. What was Mr. Wright doing during that time? A. I can't hear you.

Q. I say, what was Mr. Wright doing during that time? A. What was he doing?

Q. Yes.

A. During the time I was out there?

Q. Yes.

A. Oh, from fighting women to smoking marijuana.

Q. And you did some work for him, did you, away from there, is that right? [194]

A. I did work over there and over to his new home on 23rd avenue.

Q. Who was working over there on his new home during this time?

A. Oh, several different young men.

Q. Do you know any of them?

A. Yes, I do.

Q. Who?

A. Nathaniel Wood for one and another young man by the name of Simmons and two other fellows from back in the states worked there also, Elger Fields.

Q. Did Mr. Wright do any work over there?

A. Oh, a little.

Q. What? A. A little.

Q. How do you know?

A. Why, haven't I got eyes to see?

Q. Oh, you were over there, were you?

A. Yes, certainly.

(Testimony of William Jones.)

Q. When he was working there?

A. When I was there working, I seen him there.

Q. Working?

A. Oh, nailing a nail now and then.

Q. He would just go in and drive one nail and then he would walk away and come back and drive another nail? [195]

A. I wouldn't call him a carpenter. He worked all day long oh, 20 minutes or half hour the longest.

Q. How many full days did you put in over there?

A. Well, I would have around about four, five days before the strike was over and I worked a lot in the evenings there too.

Q. When?

A. That was in the first of June, between, I would say the 15th and—— (Interrupted.)

Q. Was it in the evening that you saw him drive a nail? A. No, it was in the daytime.

Q. In the daytime, four or five days, you were over there in the daytime? A. Uh-huh.

Q. Is that right?

A. I only saw him working over there one time, you know, he picked up a hammer and showed a fellow how to drive nails and how to put this corrugated box inside the house there for insulation over there. Further than that, I didn't see him do anything else.

Q. Was the place finished in five days?

A. No, it wasn't finished in five days.

(Testimony of William Jones.)

Q. And you don't know how long he worked there or how much work he did?

A. Well, I am only speaking about during the time I was [196] there.

Q. I say, you don't know how long he worked there or how much work he did.

A. Oh, he could still be working there. I don't know.

Q. Where was he working on the 4th day of August if you know?

A. Where he was working on the 4th day of August?

Q. Yes, of this year. Do you know?

A. No, I don't know where he was working then.

Q. Why? Weren't you working?

A. No, I was here.

Q. Oh, I know, you was in jail. How long before the 4th day, was it, of August, that you wasn't in jail?

A. How long before—— (Interrupted.)

Q. Yes. You were out how many days—how many days had you been in jail on the 4th of August? A. Previous to that?

Q. Yes.

A. We were arrested on the 30th of—I think it was the 31st or—no, it was the first of July when we were arrested.

Q. And you were there from the first of July until the—— (Interrupted.)

A. I mean the first of August.

Q. First of August until the 5th of August?

(Testimony of William Jones.)

A. I think that's about right. [197]

Q. And prior—— (Interrupted.)

A. No, the 30th. It was from the 30th until the fifth.

Q. And prior to the 30th, when was the last time that you were out there where Mr. Wright was building this house?

A. When was the last time I was there?

Q. Yes.

A. That was in July.

Q. You don't know when it was?

A. Oh, that was, as I mentioned before, it was around about the 15th of June when I went out there and I only worked there less than 10 days out there.

Q. So, the last time you saw him working out there was in June, on this house?

A. On which?

Q. On this house? A. That was in July.

Q. In July? A. Wasn't it?

Q. I don't know! I wasn't there! You said you worked out there for a week or ten days in June?

A. Yes.

Q. And I asked you if it was in June, the last time you saw Mr. Wright working on his house?

A. I am speaking of the time I put the plumbing in there. That's when he was working [198] there.

Q. He was building this new house?

A. Yes, sir.

Q. When was that?

(Testimony of William Jones.)

A. I mentioned before that was in the first part of June between the 15th and I would judge about the 25th.

Q. It wasn't in July then? A. In June.

Q. I say, it wasn't in July?

A. No, it was in June when I worked there.

Q. Now, Mr. Wright, I think you said, accused you of stealing some \$800 of his money?

A. I don't know what the sum was but he claimed we stole a safe from him.

Q. With money in it?

A. I guess so. He says so.

Q. And you said he wanted you to wear good clothes?

A. Oh, yes. I had them already before I come to Alaska. I had good clothes.

Q. Oh, you did? A. Oh, yeah.

Q. So that did not mean anything to you, did it?

A. No, not at all.

Mr. Hurley: That's all.

Mr. Hepp: No further questions.

(The witness left the stand.) [199]

Mr. Hurley: I wonder if we can have about a 10 minute recess, your Honor.

The Court: We will take a ten minute recess.

Clerk of the Court: Court is recessed for ten minutes.

(At this time, a short recess was taken.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

Clerk of the Court: They're all present, your Honor.

The Court: Counsel ready to proceed?

Mr. Hepp: Ready.

The Court: Very well.

Mr. Hurley: We are ready, your Honor.

Mr. Hepp: Call Nathaniel Wood please.

NATHANIEL WOOD

called as a witness in behalf of the government, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hepp:

Q. Would you state your name to the jury please? A. Nathaniel Wood. [200]

Q. Where do you live?

A. I live in Los Angeles.

Q. Have you ever lived in Fairbanks, Mr. Wood? A. Yes, I have.

Q. When? During what period of time did you live in Fairbanks?

A. I lived in Fairbanks—I come in Fairbanks on Memorial Day in May.

Q. Memorial Day? A. That's right.

Q. I believe you may be holding the microphone just a little too close to your mouth. Now, you say you came to Fairbanks on Memorial Day?

A. That's right.

(Testimony of Nathaniel Wood.)

Q. How long did you stay, Mr. Wood?

A. I stayed until August, sometime in August, just what—— (Interrupted.)

Q. Is that of this year? A. This year.

Q. Where did you live while you were at Fairbanks?

A. Well, I lived there on 20th street first and then after I left 20th street, I went out to the Club 69.

Q. Did you live out at the Club 69?

A. Yes, sir; Club 69, I lived out there. [201]

Q. Whereabouts at the Club 69 did you live?

A. I would say on the west side of the trailer.

Q. In what type of a structure did you live in?

A. It was in a cabin, little white cabin.

Q. On the west side of the trailer, you say?

A. Yes, sir, on the west side of the trailer.

Q. How long did you live in the little white cabin?

A. From the period I was working out there, about three weeks and a half.

Q. Three weeks and a half? Did you say— while you were working out there?

A. Yes, that's right.

Q. Then you did work out at the Club 69?

A. Sure, I worked out at the Club 69.

Q. What did you do out there?

A. I worked around his new building he was building over around the new house.

Q. What nature of work were you doing?

A. Well, I was helping the carpenter, cleaning

(Testimony of Nathaniel Wood.)

up and helping up with the plumbing work, helping the plumber.

Q. Did you work during the days or during the evenings or both or when?

A. During days and sometimes in the evenings.

Q. Did you return to the white cabin to sleep every night?

A. That's right; I returned to the white cabin to sleep.

Q. Did you ever have occasion to go into the premises—into [202] the Club 69 building?

A. Yes, sir.

Q. Would you state the number of times or approximate number of times that you had occasion to go into there?

A. Oh, I had gone there great many times. I went in there a great many times.

Q. You were in and out all the time?

A. In and out all the time.

Q. Do you know Raymond Wright?

A. Yes, sir; I know him.

Q. Do you know Vernestine Wright?

A. Sure, I know her.

Q. Did you know Raymond Wright at the time when you were living out at the Club 69?

A. I know him when I was living out there.

Q. Where was he living at the time?

A. In the house trailer.

Q. Where was Vernestine living?

A. In the house trailer.

Q. Could you set the date approximately when

(Testimony of Nathaniel Wood.)

you were living out there in this little white cabin?

A. Well, not exactly. All I know it was sometime in July. The dates I couldn't say what date it were.

Q. Sometime in July?

A. That's right. [203]

Q. Of this year? A. This year.

Q. Did you ever do any work out at the Club 69?

A. Oh, yeah, I did some work out there.

Q. Was that while you were staying there?

A. That's right.

Q. Who would instruct you as to your duties out there as to what you were to do?

A. Raymond Wright.

Q. And that was at the Club 69, was it?

A. Club 69.

Q. Mr. Wood, have you ever seen any time in your life any substance which anybody referred to as marijuana? A. Yes, sir; I have.

Q. How many times have you seen that substance?

A. Oh, great many times. I say about 10 or 12 times.

Q. At the time—at any of these times when you saw it, did you have an opportunity to examine it and inspect it and smell it? A. Sure.

Q. Were you able to fix in your mind any tests that would make it possible for you to recognize it again?

(Testimony of Nathaniel Wood.)

A. That's why I broke it and looked at it so if I ever would see it again I would know it.

Q. Then, do you know what marijuana is [204] now? A. Yes, sir; I know what it is.

Q. Just "yes" or "no," Mr. Wood, did you ever see any marijuana at the Club 69?

Mr. Hurley: Just a minute, we object to that.
Witness: Yes.

Mr. Hurley: Just a minute! We object to that as incompetent, irrelevant and immaterial; no proper foundation laid; nothing to show that this witness is qualified and an attempt to prove a crime that is not charged in the indictment.

The Court: You will fix the time later, will you?

Mr. Hepp: I will endeavor to, your Honor.

The Court: Objection overruled.

Mr. Hurley: Exception.

Q. (By Mr. Hurley): Just "yes" or "no," would you answer the question? A. Yes.

Q. What was the time or the date that you saw it?

Mr. Hurley: Same objection.

The Court: Same ruling.

Witness: Day after day. [205]

Q. (By Mr. Hepp): Day after day?

A. When I was around there.

Q. Did you ever see any marijuana in the area where you slept?

Mr. Hurley: Same objection.

Witness: Sure.

Mr. Hepp: Just a minute, Mr. Wood. Mr. Hur-

(Testimony of Nathaniel Wood.)

ley wants to object after every one of these questions, so if you will hold your answer up until he has had an opportunity.

The Court: Objection overruled.

Q. (By Mr. Hepp): Now, will you answer the question? A. Sure.

Q. Where did you see it there?

A. In my sleeping quarters.

Q. Whereabouts in your sleeping quarters?

A. In the little cabin, white cabin I was sleeping in underneath the bed.

Q. Was it in any kind of a container?

A. It was Velvet cans, Velvet cans and some was rolled, some was laying out on a newspaper drying.

Q. Velvet cans?

A. Velvet tobacco cans.

Q. Do you know who—just “yes” or “no”—do you know [206] who put the marijuana there?

Mr. Hurley: Same objection, if the Court please.

The Court: Objection overruled.

Witness: Yes.

Q. (By Mr. Hepp): Who put the—who put it there? A. Tam.

Mr. Hurley: What was that answer?

Q. (By Mr. Hepp): Tam?

A. That's right.

Q. Do you know what his full name is?

A. No—Everett Fields.

Mr. Hurley: I move that that answer be stricken out as incompetent, irrelevant and immaterial; not

(Testimony of Nathaniel Wood.)

within the issues of the case; not binding on this defendant in any way that I know of.

The Court: Can you make it relevant, will you, after a few questions?

Mr. Hepp: I don't believe I can and I don't mind that it be stricken.

The Court: May be stricken then.

Q. (By Mr. Hepp:) Just "yes" or "no," Mr. Wood, did you ever hear Mr. [207] Wright make any statement concerning marijuana?

A. Yes.

Q. Where were you when this statement was made? A. I was in his presence.

Q. Where was the—where did the conversation take place? A. In the cabin.

Q. In the cabin? That is the little white cabin that you have been talking about?

A. The white cabin I was talking about.

Q. Who was present at the time that this conversation was had?

A. Everett and myself and Tam.

Q. Would you state those again please?

A. I said Raymond Wright and myself and Tam.

Q. When—— (Interrupted.)

Mr. Hurley: What was that last name?

Mr. Hepp: Tam.

Mr. Hurley: Did he say that was Everett Fields?

Witness: That's right.

Q. (By Mr. Hepp): Can you fix the month and

(Testimony of Nathaniel Wood.)

the year and the week or date that this conversation took place?

A. I don't think I can. [208]

Q. Well, during—can you fix the month?

A. It was in July.

Q. Was it in the early part or the latter part of July? A. Latter part of July.

Q. And that is of this year?

A. This year.

Q. What did Raymond Wright say concerning—— (Interrupted)

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial; no proper foundation laid.

The Court: Objection overruled.

Mr. Hurley: Not within the issues of the case and an attempt to prove a crime other than that charged in the indictment.

The Court: Overruled.

Q. (By Mr. Hepp): Would you answer the question? What did Mr. Wright say?

A. He was telling how he wanted it rolled.

Q. How he wanted what rolled?

A. Marijuana.

Q. Who did he tell that to? A. Tam.

Q. Can you recall what he said in regard to rolling it?

A. Well, he told him to try to get all the—many as he [209] could out of a can.

Q. Mr. Wood, at any time while you were at the Club 69 and in the presence of either of the

(Testimony of Nathaniel Wood.)

defendants, Raymond Wright or Vernestine Wright, did you ever see any marijuana smoked?

Mr. Hurley: We object to that—— (Interrupted.)

Mr. Hepp (To witness): Just a minute.

Mr. Hurley: Just a minute. Incompetent, irrelevant and immaterial; no proper foundation laid; not within the issues and an attempt to prove something that is not charged in the indictment.

The Court: Objection overruled.

Q. (By Mr. Hepp): Would you answer the question? A. I did.

Q. On how many occasions did you see marijuana smoked out there in the premises of the Club 69 in the presence of the defendants?

Mr. Hurley: Same objection.

Witness: Oh, great many times.

Q. (By Mr. Hepp): Now, Mr. Wood, during any time when you were at the Club 69 and in the presence of Raymond Wright, did you ever see any marijuana sold at the Club 69? [210]

Mr. Hurley: Same objection.

Mr. Hepp (To witness): Just a minute, don't answer.

The Court: Same ruling.

Q. (By Mr. Hepp): All right, answer the question, please. A. I did.

Q. Mr. Wood, at any time when you were at the Club 69 and in the presence of the defendant,

(Testimony of Nathaniel Wood.)

Mrs. Vernestine Wright, did you ever see any marijuana smoked—sold at the Club 69?

Mr. Hurley: Same objection.

Mr. Hepp (To witness): Just a minute.

The Court: Same ruling.

Witness: I did.

Q. (By Mr. Hepp): Who sold the marijuana then, Mr. Wood? A. Vernestine.

Q. Did you ever see Raymond Wright sell any marijuana? A. Sure, I saw him sell it.

Q. More than once? A. More than once.

Q. Did you smoke any while you were out there, Mr. Wood? A. Never smoke any.

Q. Pardon? [211]

A. I never smoked any.

Mr. Hepp: That's all, you may question the witness.

Cross-Examination

By Mr. Hurley:

Q. Mr. Fields—Mr.—is it Wood or Woods?

A. Wood.

Q. How old are you, Mr. Woods?

A. 34.

Q. Didn't you testify here two or three days ago that you were only 30?

Mr. Hepp: Now, your Honor, I object to that. I think that matter was all straightened out. I don't think it has any bearing to the issues of this case.

The Court: He can answer it.

(Testimony of Nathaniel Wood.)

Witness: I did.

Q. (By Mr. Hurley): Now you are 34?

A. I explained it out the other day.

Q. You didn't know how old you were then, but you know now, is that right?

A. I knowed the other day.

Q. You said—— (Interrupted.)

A. That's why I straightened it out. [212]

Q. You said you were 30, didn't you?

A. Sure, I said I was 30, but—— (Interrupted.)

Q. Now you claim you are 34.

The Court: Let him finish his answer.

Mr. Hurley: All right.

The Court: What is the rest of your answer. You said you were 30 but, but.

Witness: But in the excitement and everything, I straightened myself out and I told you I was 34.

Q. (By Mr. Hurley): You were very excited when you testified before, were you?

A. A little nervous.

Q. More so than you are now?

Mr. Hepp: I object to that. That's a pure—calling for a conclusion, a pure conclusion, your Honor.

The Court: Sustained, objection sustained.

Mr. Hurley: Save an exception.

Q. (By Mr. Hurley): You say you saw Mrs. Wright sell marijuana? A. I did.

Q. Who to? [213]

A. Some guy or another. I don't know his name.

(Testimony of Nathaniel Wood.)

Q. What did he look like?

A. (Pause.) Will you repeat that question again?

Q. I say, what did he look like?

A. He was a man. That's all I can tell you.

Q. As near as you can tell, that's all you know?

A. A man.

Q. When was it? A. Some time in July.

Q. Who was there when she sold it?

A. Oh, great many people there.

Q. Great many people? How many?

A. Oh, I would say 10 or 12.

Q. Ten or twelve? Did you know any of them that saw her sell it? A. No.

Q. You didn't know any of the people that were in there? A. She wasn't in the club.

Q. Where was she?

A. She was in the trailer.

Q. And then there were 10 or 12 people in the trailer when she sold it?

A. Around the building.

Q. Where were these people? Where were they?

A. In the club. [214]

Q. They were in the club when she sold it, is that right? A. That's right.

Q. And she sold it in the trailer and these people were there in the club? A. That's right.

Q. Where did she sell it, in the club or in the trailer?

A. In the trailer. The fellow come down to where she had it.

(Testimony of Nathaniel Wood.)

Q. What?

A. The fellow come to the trailer. She had it.

Q. Had what? A. Had the marijuana.

Q. How did she sell it to him if he already had it when he went there?

A. He didn't have it. I didn't say he had it.

Q. You said he had marijuana when he went to the trailer?

Mr. Hepp: Now, your Honor, this witness did not say that. Counsel is trying to argue—— (Interrupted.)

Q. (By Mr. Hurley): Well, what did you say?

Mr. Hepp: Just a minute, Mr. Hurley. I object to this unless counsel can straighten out these questions and ask questions that this witness is capable of answering and not paraphrasing words—— (Interrupted.)

Mr. Hurley: I am not responsible for [215] his capabilities, your Honor. I have a right to cross-examine.

The Court: Well now, you asked him a question, haven't you?

Q. (By Mr. Hurley): Where did you see Mrs. Wright sell marijuana?

A. It was in the trailer where she give marijuana.

Q. Who was there?

A. The fellow that bought it.

Q. Anybody else?

A. No, wasn't nobody in there. I was on the outside there working.

(Testimony of Nathaniel Wood.)

Q. And how do you know she sold it if you weren't in there?

A. I saw him come out with it in his hand—handed it to him?

Q. What?

A. I saw when she handed it to him.

Q. Was the door open to the trailer?

A. The door was open to the trailer.

Q. Yes and you were standing out looking in?

A. I was working right in front of the trailer door.

Q. What were you doing?

A. Just digging a cesspool.

Q. Right in front of the trailer? [216]

A. On the side.

Q. What? A. In front of the door.

Q. Right in front of the door, digging a cesspool, is that right?

A. That's why I was looking.

Q. I see. You said you were digging a cesspool, is that right? A. That's right.

Q. Right in front of the trailer.

A. That's why I was working right in front of the trailer door.

Q. That's where the cesspool was?

A. No. The cesspool was off the trailer door, but my work was in front of the trailer door.

Q. What were you doing?

A. Fixing the cesspool.

Q. All right. And what kind of a looking man was this that you saw go in the trailer?

(Testimony of Nathaniel Wood.)

A. Oh, he was about my height. That's all I could give you, about my height.

Q. Do you know what color he was?

A. He was a colored man.

Q. He was? Did you ever see him before?

A. No, I never saw him before. [217]

Q. Did you ever see him afterwards?

A. No.

Q. Did you ever give a description of him to the Marshal? A. No, I haven't.

Q. Did you ever make an attempt to find what his name was? A. No.

Q. You don't know anything about him? How do you know that Mrs. Wright sold him marijuana?

A. Because I was looking at him.

Q. What? A. I was looking at him.

Q. And what did she give it to him in?

A. Repeat that question again.

Q. I say, what did she give it to him in?

A. Just give it, just handed it in her hand and she give it to him.

Q. Just poured it out of her hand into his hand, is that right?

A. I don't know whether she poured it out but she handed it to him.

Q. What? A. She handed it to him.

Q. And did you—where did she have it when she handed it to him? [218]

A. Somewhere in the trailer.

Q. And what did she give it to him in?

Mr. Hepp: I object, your Honor. I believe he

(Testimony of Nathaniel Wood.)

had asked that question before, the very same words.

The Court: Objection overruled.

Q. (By Mr. Hurley): Just answer the question.

A. She didn't give it to him in anything. She had it in her hand and handed it to him.

Q. Where did she get it?

A. Somewhere in the trailer.

Q. How much did she have in her hand?

A. I don't know. All I saw was one.

Q. One what? A. One stick.

Q. What do you mean by "one stick"?

A. One cigarette.

Q. Oh. And describe that, will you, that cigarette.

A. It is a little bit larger than a match stick. It is in brown paper.

Q. Well, then all you saw was a brown paper, wasn't it? A. (Pause.)

Q. You didn't see anything inside the paper, did you?

A. No, I didn't see anything inside the [219] paper.

Q. So, you saw him go in there and get a little piece of brown paper rolled and about how long was it? A. As large as a cigarette.

Q. What?

A. About as long as a cigarette.

Q. And was there tobacco in it?

A. Twisted on each end.

Q. I say, was there tobacco in it?

(Testimony of Nathaniel Wood.)

A. I couldn't see through it.

Q. You don't know what was in it, do you?

A. Repeat that question again.

Q. I say, you don't know what was in it?

A. No, I don't.

Q. Well, then, why did you say you saw her give him marijuana?

A. Because I saw many like that before, broke them off and looked at them.

Q. I see. You have seen little brown paper rolled with tobacco or marijuana?

A. Marijuana.

Q. You have seen them rolled with tobacco in it, haven't you? A. Not many.

Q. You never saw brown paper with tobacco rolled in it? A. Repeat that question. [220]

Q. I say, you never saw any brown paper with tobacco rolled in it? A. Oh, yeah.

Q. Lots of them, haven't you?

A. Not many.

Q. Not many? A. No.

Q. Not as many as marijuana?

A. No. I haven't saw not many of them.

Q. Did you ever smoke marijuana?

A. Never smoked it in my life.

Q. What?

A. Never smoked it in my life.

Q. Did you ever see any rolled? A. Sure.

Q. Who rolled them? A. Tam rolled them.

Q. Who is Tam? A. Vernestine's cousin.

Q. What is his name?

(Testimony of Nathaniel Wood.)

A. Oh, I know we called him Tam. I think his right name is Everett Fields.

Q. Was he living in this cabin with you?

A. In the cabin with me.

Q. What? [221] A. That's right.

Q. In the cabin with you?

A. That's right.

Q. And you lived there and he lived there?

A. That's right.

Q. And that is where the officers found the can, an empty can, wasn't it? A. I don't know.

Q. Well, you know what cabin it was, don't you? A. I know what cabin I stayed in.

Q. What one was it?

A. The little white cabin on the west side of the trailer.

Q. And you and Everett Fields lived there, didn't you? A. That's right.

Q. And how long had you lived there prior to the 4th day of August of this year?

A. Prior to the 4th day of August? I was in jail the 4th day of August.

Q. Well, you lived there prior to that time, didn't you? A. (Pause.)

Q. I say, you lived there prior to the 4th of August, didn't you? A. Yeah.

Q. How long in this cabin?

A. I couldn't tell you exactly. [222]

Q. You weren't here on the 4th of August?

A. I was here.

Q. What?

(Testimony of Nathaniel Wood.)

A. I was here the 4th of August. I was in jail.

Q. That's what I thought. What were you in there for?

A. I was arrested and brought back.

Q. What?

A. I was arrested and brought back from the border.

Q. You were accused of stealing some money from Mr. Wright, weren't you?

A. That's right.

Q. When did you get out?

A. I don't know exactly the date I got out.

Q. You don't remember?

A. Don't remember.

Q. The 5th, wasn't it, of August?

A. I still don't know exactly.

Q. Do you know when you left here after you got out of jail?

A. No, I don't remember.

Q. What?

A. I don't remember.

Q. How did you go out?

A. Drove out.

Q. What? [223]

A. I rode out with the highway patrol.

Q. After you got out of jail, huh?

A. That's right.

Q. And who went with you?

A. William Jones.

Q. Who else?

A. Crossing the state line—— (Interrupted.)

Q. I say who else left with you?

A. Left? Fairbanks? With me?

Q. Yes.

A. Highway patrol.

Q. Besides you and Jones?

(Testimony of Nathaniel Wood.)

A. That's right.

Q. Nobody else? A. Nobody else.

Q. How did Vanada Donaby leave?

A. I don't know.

Q. She didn't leave with you?

A. She did not.

Q. She was leaving with you though when you got arrested, wasn't she? A. That's right.

Q. And you filed a law suit against Mr. Wright didn't you, just the other day?

Mr. Hepp: Now, I object. I object [224] to that, your Honor.

The Court: Objection overruled.

Q. (By Mr. Hurley): Just answer the question. A. I did.

Q. You don't like him very well, do you?

A. I don't have a thing against him.

Q. Now, you said you saw Mr. Wright sell some marijuana cigarettes? When was that?

A. Club 69.

Q. When?

A. When? I don't know the date.

Q. About when? A. Sometime in July.

Q. Who did he sell them to?

A. Some gentlemen.

Q. What? A. Some gentlemen.

Q. When? How many?

A. I don't know. I was in the bed.

Q. What bed? A. The bed I sleep.

Q. Out in the cabin? A. Out in the cabin.

Q. And he was in the 69 Club? [225]

(Testimony of Nathaniel Wood.)

A. He was in the cabin.

Q. Oh. I thought you said he was in the 69 Club?
A. I didn't say the 69 Club.

Q. Oh, it was in the cabin, was it?

A. That's right.

Q. And in your cabin? A. That's right.

Q. Who else was there?

A. Everett Fields was in there.

Q. And you? A. That's right.

Q. And who came in and bought the cigarettes?

A. Some gentlemen. I don't know.

Q. What kind of a looking man was he?

A. He was a soldier.

Q. Was he a colored boy or white?

A. White.

Q. And did you ever find out who he was?

A. No, sir.

Q. Did you ever tell the officers about him?

A. Repeat that question again.

Q. Did you ever tell any of the officers about him?
A. No, I did not.

Q. Why?

A. This Mr. Wright—I come up to make money and just [226] make enough money to pay my expenses back and what I had spent. I heard him several times offer—say that he had everything sewed up—— (Interrupted.)

Q. Now, just a minute! I don't want you to start in telling something—just answer the question. I asked you a question. Why didn't you tell the officers about this man coming there?

A. I am coming to the point now.

(Testimony of Nathaniel Wood.)

Q. Well, just answer it. Why didn't you tell them? A. I didn't tell them.

Q. Why?

A. On account of I heard him say that he had paid off so many around here. I didn't want to get myself involved in no kind of trouble or anything. I wanted to stay out of it.

Q. When did you make up your mind to tell them? A. After he had me arrested.

Q. I see. After you were in jail, is that right?

Mr. Hepp: I object to that. He is just putting words and paraphrasing—— (Interrupted.)

Mr. Hurley: I got a right to cross-examine.

The Court: Objection sustained.

Mr. Hepp: Well, I don't mind—— (Interrupted.)

Mr. Hurley: Well, I'll put it this way. [227]

Q. (By Mr. Hurley): Was the first time you ever mentioned it after you were put in jail or before? A. Repeat that again.

Q. I say, was it after you were put in jail or was it before that that you first mentioned this man buying cigarettes to the officers?

A. I told my friends and Bill Jones—— (Interrupted.)

Q. Now just answer the question. I am asking you what you told the officers.

A. Afterwards.

Q. After you was put in jail? You had never mentioned it before that to the officers, is that right?

A. That's right.

(Testimony of Nathaniel Wood.)

Q. And when did you—you know Vanada Donaby, do you? A. I do.

Q. And when did you see her after you left Fairbanks? A. Repeat that question again.

Q. I say, when did you see her after you left Fairbanks after you got out of jail?

A. Oh, I didn't see her no more. I didn't see her no more until we was on our way.

Q. What?

A. About four weeks ago. This Saturday will be four weeks ago. [228]

Q. Where did you see her?

A. In Seattle.

Q. Now, how many times did you see Mr. Wright sell cigarettes?

A. I couldn't say how many times. A great many times.

Q. How many?

A. I never did count the times that I saw him.

Q. Have you any idea? A. No, I don't.

Q. Do you know anybody that you claim he sold them to?

A. Repeat that question again.

Q. Do you know anybody that you claim he sold them to so we can get their names?

A. No, I don't.

Q. What? A. I don't know their names.

Q. You know what they looked like?

A. All I know is they were people; they was human.

(Testimony of Nathaniel Wood.)

Q. And can you tell us about any of them so that we can try to find out who they were?

A. No, I can't.

Q. Were they colored people or white?

A. They was white.

Q. What? A. They was white. [229]

Q. All white? A. And colored.

Q. What? A. White and colored.

Q. And was there ever as many as three?

A. It was more than that.

Q. How many? A. I can't tell how many.

Q. About how many? A. (Pause.)

Q. Well, how many would you think you saw?

A. Every day, ten or twelve.

Q. Whereabouts were you when you saw him sell them?

A. Around the club, in the house where I stayed.

Q. Where?

A. In the cabin where I stayed at.

Q. In the cabin? A. That's right.

Q. And that's where they were sold, in the cabin that you and this other man were living in, is that right?

A. That's where I seen them sold.

Q. Did you ever see any sold in the Club 69 proper?

A. Oh, I have seen lots of them in the Club 69.

Q. And where were they kept?

A. All around. Some under the chair, some——

(Interrupted.) [230]

(Testimony of Nathaniel Wood.)

Q. They were kept where?

A. Underneath the chair.

Q. And where else?

A. On the cash register.

Q. And underneath the chair?

A. And around the cash register.

Q. What kind of a place was there under the chair that they were kept? A. I don't know.

Q. What? A. I don't know.

Q. Well, didn't you see them?

A. Just underneath the chair.

Q. I say, but what were they kept in underneath the chair?

Mr. Hepp: Your Honor, there is no evidence that they were kept in anything under the chair. I don't think he has addressed a fair question.

Mr. Hurley: I have a right to cross-examine.

The Court: Objection overruled.

Q. (By Mr. Hurley): What were they kept in underneath the chair?

A. They was all together.

Q. What?

A. They was all together, a piece of rubber around them. [231]

Q. And where were they kept? What was there? A container there under the chair?

A. No container.

Q. Just laying on the floor?

A. That's right.

Q. And they had a rubber around them?

A. That's right.

(Testimony of Nathaniel Wood.)

Q. And then if somebody would come in, why they would go—Mr. Wright would go and pick these up off the floor and take one and put the rubber back and throw it on the floor again, is that right? A. I don't know.

Q. Didn't you see him sell any?

A. I didn't see him sell any in the Club 69.

Q. I see. How were they kept in this cabin that you lived in? A. Rubber band around them.

Q. What?

A. Rubber band around them. They was rolled up.

Q. What around them?

A. A rubber band was around those and they was rolled up.

Q. And where were they kept?

A. Some of them under the bed, some on the shelf in the clothes closet.

Q. And how many men did you say you saw come in there? [232]

A. I didn't say exactly how many men.

Q. About how many men?

A. A great deal of men. I didn't count them.

Q. And was Mr. Everett Fields in there, too?

A. That's right.

Q. How much they pay for them?

A. Two and a half, one and a half.

Q. What?

A. Two and a half, one and a half.

Q. A bundle? A. No, a stick.

(Testimony of Nathaniel Wood.)

Q. And what did they do with them after they bought them?

A. I never looked and see what they did with them.

Q. What?

A. When they would get them, they would walk out because I was in bed.

Q. Were you always in bed when this happened?

A. At night.

Q. What? A. At night I would be in bed.

Q. You say you worked over at Mr. Wright's place where he was building a house?

A. That's right.

Q. What was Mr. Wright doing there?

A. Oh, he would come over there sometime. Sometime he [233] would pick up a hammer and nail a few nails and he would be gone. He never stayed over there but an hour, hour and a half, something like that.

Q. While you were there?

A. That's right.

Q. And who else was working there?

A. He had a carpenter working for him.

Q. What?

A. He had a carpenter working for him there.

Q. And didn't he go over there and help the carpenter? A. No.

Q. What?

A. No. I was helping the carpenter.

Q. Mr. Wright didn't do any work?

A. No.

Q. What?

(Testimony of Nathaniel Wood.)

A. He didn't do any work while I was working over there.

Q. Now, who was working there besides you?

A. This fellow named Sims was working there.

Q. Who? A. Sims.

Q. Sims? A. Sims is right.

Q. Is he a colored man?

A. Colored man. [234]

Q. Same as you are? Who else?

A. Everett Fields was working there.

Q. Who else? A. That's all.

Q. And you? A. That's right.

Q. Just the 3 of you? A. That's right.

Q. And did you finish the house before you left? A. I did not.

Mr. Hurley: That's all.

Mr. Hepp: That's all.

(The witness left the witness stand.)

Mr. Hepp: I will rest the government's case, your Honor.

Mr. Hurley: I wonder if we could have about a 10 minute recess. I would like to make a motion at that time.

The Court: Well, I will let you make your motion first. The jury will be excused and remain in the hallway until called.

(The jury left the court room.)

(At this time, Mr. Hurley presented a motion to the court for an instructed verdict of not guilty and a judgment of acquittal for the

reason that the [235] evidence is insufficient to go to the jury; no evidence to show that the cigarettes were in the possession of either one of the defendants; no evidence that the defendants owned the premises or that they were in possession of the cabin in which the can was found and that there was no competent evidence sufficient to go to the jury with regard to the crime charged in the indictment and that the only evidence introduced is evidence of something of which the defendants were not accused of and that the evidence is entirely insufficient to support the allegations contained in the indictment.)

(Mr. Hepp presented argument to the court resisting the motion.)

(Mr. Hurley presented further argument.)

The Court: Motion denied.

Mr. Hurley: Could we have about a 10 minute recess?

The Court: Yes, we will take a recess until five minutes after.

Clerk of the Court: Court is recessed until five after four.

(At this time a short recess was taken.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.) [236]

Clerk of the Court: They're all present, your Honor.

The Court: Counsel ready to proceed with the trial of this case?

Mr. Hurley: We are ready, your Honor.

The Court: Very well, call your witness.

Mr. Hurley: I call Mrs. Wright, Vernestine Wright.

VERNESTINE WRIGHT

called as a witness in her own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hurley:

Q. What is your name?

A. Vernestine Wright.

Q. And where do you live, Mrs. Wright?

A. I live at 23rd and Abigail.

Q. Here in Fairbanks? A. Yes.

Q. How long have you lived here?

A. Oh, about three years and 9 months.

Q. And Mr. Wright, Raymond Wright, sitting here is your husband, is he? [237] A. He is.

Q. Do you have any children? A. I have.

Q. How many? A. Two.

Q. How old are they?

A. My little girl is 3 and my little boy is 2.

Q. Where were they born?

A. Fairbanks, Alaska.

Q. Where were you born, Mrs. Wright?

A. Galveston, Texas.

(Testimony of Vernestine Wright.)

Q. How old are you? A. Twenty-nine.

Q. Was either your mother or father colored people? A. My mother was half colored.

Q. Who was you father? A. Irish.

Q. Were you raised with colored people?

A. I was.

Q. Go to a colored school? A. I did.

Q. Where did you first meet Mr. Wright?

A. Texas.

Q. How old were you then?

A. About 14. [238]

Q. And you have known Mr. Wright ever since then? A. I have.

Q. Were you in school together? A. No.

Q. Where were you married?

A. Ogden, Utah.

Q. You heard the testimony of all the witnesses that have testified here? A. I have.

Q. You have been present at all the evidence?

A. Yes.

Q. Did you or your husband ever have any marijuana? A. Certainly not.

Q. Did you ever sell any?

A. I have never sold marijuana.

Q. Did he ever sell any that you know of?

A. To my knowledge, no.

Q. On the 4th of August of this year, were you out there when the marshals came out?

A. I was.

Q. And where were you?

A. I was lying in bed.

(Testimony of Vernestine Wright.)

Q. What? A. I was lying in bed.

Q. Where? [239] A. In the silver trailer.

Q. And how did you find out the officers were there?

A. I think Deputy Marshal Martin knocked and as he knocked, he entered.

Q. And what did you do then?

A. Well, I wanted to know what he wanted and he asked me to get up and put on my clothes.

Q. What did you do then?

A. I slipped on a dress and he escorted me over to the Club 69 where Mr. Barber read me a search warrant inside of the building.

Q. That was Deputy Marshal Barber, was it?

A. That's right.

Q. And did they proceed there to search the premises, Mrs. Wright?

A. They did very thoroughly.

Q. Did they search any other places besides the 69 Club proper?

A. Well, I learned later they did.

Q. What? A. I learned later they did.

Q. But you were in the 69 Club after you left the trailer cabin where you were in bed until they left, is that right, Mrs. Wright?

A. Until who left? [240]

Q. What?

A. I was in the Club 69 until I think Mr. Greer escorted me back to the trailer to put on my clothes to go to town.

Q. Oh, they arrested you then?

(Testimony of Vernestine Wright.)

A. Well, they took me to town.

Q. They brought you into town? A. Yes.

Q. And you put on your clothes?

A. I did.

Q. And did you make any statement to any of the officers in regard to what they claimed they found in there, in the Club 69?

A. I think I told Officer Barber, the District Attorney and the Marshal—— (Interrupted.)

Q. No, I mean—— (Interrupted.)

A. There you mean?

Q. Not here in town. Out there?

A. I told them I had never seen marijuana, I had never used marijuana in any form and I would stand any test the State would put me before.

Q. Do you smoke even tobacco cigarettes?

A. I have never smoked in my life.

Q. Does your husband smoke tobacco cigarettes?

A. I have never seen him smoke.

Q. What? [241]

A. I have never seen him smoke.

Q. Were you present when—in the room—when Mr. Barber, the Deputy Marshal, claims that he picked up some cigarettes behind a chair?

A. I was.

Q. Did you see him pick them up?

A. I saw when he showed them to me.

Q. But you didn't see him pick them up?

A. No, I couldn't say I did.

Q. You don't know how they got there?

Mr. Hepp: Your Honor, I am going to object to

(Testimony of Vernestine Wright.)

these leading questions. I think these—I think this witness should testify to what she knows.

The Court: Objection sustained.

Q. (By Mr. Hurley): Do you know how they got there behind that chair, Mrs. Wright?

A. I don't know.

Q. Now, when was the last time that you were in the place prior—in the 69 Club proper where they claimed they found these cigarettes—before they came out there to make this search?

A. I can't state the exact hour and the time I left the Club 69 but it was between four a.m. that morning and five-thirty. [242]

Q. That is when you closed—when you left?

A. That is when I left.

Q. Was there anybody in there when you left?

A. There was.

Q. Who was there?

A. Opal Weldon and Elgie Fields and David Weldon.

Q. Anybody else? A. That's all.

Q. And was there any arrangement made by you for somebody to clean the place up before opening it up later in the day, Mrs. Wright?

A. There was.

Q. And who did the janitor work to clean the place?

A. David Weldon had to do the janitor work.

Q. What?

A. David Weldon had been doing the janitor work.

(Testimony of Vernestine Wright.)

Q. And was there anybody else helping him that particular day?

A. Elgie Fields was helping them because he was going to leave town the following week.

Q. Who was going to leave?

A. David Weldon was going to leave.

Q. And Everett Fields?

A. Elgie Fields.

Q. Elgie Fields? Is he any relation to [243] you? A. He is.

Q. What relation? A. Cousin.

Q. He is a cousin of yours? A. Yes.

Q. I see. And did he work there that day cleaning the place before the officers came?

A. Yes. He was there when the officers arrived.

Q. And this—did you hear the testimony of Nathaniel Wood? A. I did.

Q. This cabin that he says he was living in, was there anybody else living in that cabin with him at the time he was living there? A. There was.

Q. Who? A. Elgie Fields.

Q. I see, and is that the cabin where the officers—some officer testified that he found a can, a tobacco can there? A. It was.

Q. You heard the testimony?

A. I heard the testimony.

Q. And that was the cabin?

A. That was the cabin. [244]

Q. What was Mr. Wright doing prior to the 4th of August of this year?

(Testimony of Vernestine Wright.)

A. Well, he had been assisting the carpenter with the building of the house for some time, for over a month, almost two months.

Q. What house—what kind of a house was that?

A. Well, we are building a private home.

Q. And how far was that from the 69 Club where you were building your home?

A. Approximately about 8 blocks.

Q. And how long had it been, if you remember, since Mr. Wright had been with you in the trailer cabin prior to the 4th of August of this year?

A. Well, that's a long time to remember. I know definitely that Mr. Wright hadn't been on the premises in a day and a half at least because I had to go over where he was working.

Q. And where were your children at that time?

A. The were in San Francisco.

Q. How did they happen to be out there?

A. My little boy has been to a specialist for over a year now.

Q. What was the trouble?

A. He was a premature baby, a 6 month's baby and he had quite a few difficulties. [245]

Q. And both the children were outside when this raid took place?

A. Yes.

Q. I see. And—excuse me just a minute, your Honor. I would like to see those pictures (handing document to witness). Calling your attention to government's exhibit "D," I will ask you to state, if you know, what that is, Mrs. Wright.

A. You mean in the picture?

(Testimony of Vernestine Wright.)

Q. Yeah. What is the picture of?

A. Well, a chair, some beer, a stool, a lamp and also a couch.

Q. Do you recognize it as a part of the interior—— (Interrupted.) A. I do.

Q. (Continuing.) ——of the 69 Club?

A. Yes.

Q. I notice you say—have you ever seen this picture before? A. You mean the interior?

Q. No, this picture? A. No, I haven't.

Q. I notice you say there is some beer down in the lower left hand corner of the picture, some cans of beer, is that right? [246] A. Yes, sir.

Q. And was that beer down there where it is shown in the picture at the time the officers came out there and made the raid?

A. No, it wasn't.

Q. Where was it?

A. In the refrigerator.

Q. How did it get out on the floor?

A. Mr. Barber put it there.

Q. Prior to taking this picture, he put the beer down here on the floor, did he, as it is there?

A. Yes, before the picture was taken.

Mr. Hurley: I think that's all. You may cross-examine.

Cross-Examination

By Mr. Hepp:

Q. How long have you lived at 23rd and Abigail, Mrs. Wright?

(Testimony of Vernestine Wright.)

A. Since, let's see, oh, about 5—about 6 weeks now, I'm sure.

Q. Prior to that time, where did you live?

A. I lived at the Club 69.

Q. In a little trailer?

A. In the silver trailer, to be sure. [247]

Q. You know where David Weldon is now?

A. I don't know the exact place where he is.

Q. Is he here in Fairbanks?

A. No, he isn't. He is in California.

Mr. Hepp: I have no further questions.

(The witness left the stand.)

Mr. Hurley: I call Elgie W. Fields.

Mr. Hepp: I wonder if I could just ask this last witness one more question, your Honor?

The Court: Yes.

(Mrs. Wright resumed the stand.)

Q. (By Mr. Hepp): I would like to ask, Mrs. Wright, have you ever been convicted of a crime?

A. Yes.

Mr. Hepp: That's all.

(The witness left the stand.)

Mr. Hurley: I call Elgie W. Fields.

ELGIE W. FIELDS

called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hurley:

Q. What is your name? [248]

A. Elgie Fields.

Q. And where do you live, Elgie?

A. 521-4th Street.

Q. How long have you lived in the vicinity of Fairbanks? A. Ever since June 19th, 1950.

Q. Are you acquainted with Mr. Wright and Mrs. Wright, the defendants? A. I am.

Q. How long have you known them?

A. Well, I have known her all my life and him, I know him ever since I was about 12.

Q. And you know Mrs. Wright a long time?

A. I have.

Q. Are you any relation to her? A. I am.

Q. What relation? A. Cousin.

Q. And were you out at the 69 Club on the 4th of August of this year when the officers came out there to make an arrest? A. I was.

Q. And had you done any work around there that day before they came out? A. I had.

Q. What did you do? [249]

A. Well, I was helping the janitor.

Q. Who was the janitor at that time?

A. David Weldon.

Q. I see. Is he a colored boy, too?

(Testimony of Elgie Fields.)

A. Yes, he is.

Q. Same as you are? A. That's right.

Q. And what work did you do there that day before the officers came out in regard to janitor work?

A. Well, that's all I did around there that day was scrub and wax the floor and change the furniture around.

Q. And was that in the main room of the 69 Club? A. It was.

Q. What time did you finish your janitor work that day, Elgie?

A. Oh, I finished the janitor work about twelve-thirty.

Q. About 12 o'clock?

A. About 12—12:30, between 12 and 12:30.

Q. And were you out there when the officers came in? A. I was.

Q. Now, when you did this janitor work, just explain to the jury everything that you did in regard to the floor?

A. Well, when I did the janitor work, we first moved all the furniture in one place, swept the floor, then scrubbed the floor, let the floor dry and waxed it. After [250] the wax dried, we run the buffer over it and then placed the furniture back.

Q. Now, were there any—was there a package of cigarettes on the floor after you finished your work?

A. No, there was nothing on the floor.

(Testimony of Elgie Fields.)

Q. Was there—did you see anything on the floor?

A. I didn't see anything on the floor.

Q. Except what you swept up?

A. That's right.

Q. When you got through, the floor was entirely clean, was it? A. That's right.

Q. If there had been a package of cigarettes lying behind a chair, would you have seen it?

A. I would have seen it.

Q. You moved all the chairs and furniture?

A. That's right.

Q. When you waxed the floor? A. I did.

Q. Were you in here when this Nathaniel Woods was—Wood or Woods—was on the witness stand?

A. I was.

Q. You know him, do you?

A. Yes, I do.

Q. And did you live in the same cabin he did out at the [251] Club 69? A. I did.

Q. You and he lived in this cabin that he spoke about, is that right? A. We did.

Q. And you heard him testify that there was marijuana out there in the cabin? You heard that testimony?

A. I heard him testify to that.

Q. Was there any marijuana out there that you knew about in that cabin?

A. I have never seen any.

Q. Never saw any? A. That's right.

(Testimony of Elgie Fields.)

Q. Did you ever see Mr. Wright have any marijuana in that cabin?

A. No, I have never—— (Interrupted.)

Q. What? A. No.

Q. Did you ever see any marijuana?

A. Well, I have seen what they claim was marijuana, but actually see marijuana, I have never seen—— (Interrupted.)

Q. What?

A. I have never actually seen marijuana.

Q. You have seen what people told you it was? Whereabouts was that? [252]

A. In California.

Q. In California? A. That's right.

Q. But you wouldn't be able to identify it?

A. No, I wouldn't.

Q. You never smoked any?

A. No, I haven't.

Q. And there was no marijuana in this cabin that you and this man Woods lived in?

A. Not that I know of.

Q. If there was any there, you didn't know about it, is that right?

Mr. Hepp: Now, your Honor, I believe these leading questions ought to stop.

Mr. Hurley: I say—— (Interrupted.)

The Court: You're quite right.

Mr. Hepp: Just a minute, let the Court rule, Mr. Hurley.

The Court: I agree with you but your objection comes too late. He has already answered.

(Testimony of Elgie Fields.)

Q. (By Mr. Hurley): Now, did you ever see any marijuana cigarettes sold out there or cigarettes rolled in brown paper sold?

A. No, never seen any.

Q. Were you there all during the time that this search [253] was being made? A. I was.

Q. Have you ever seen this picture before? (Handed document to witness.)

A. No, I have never seen the picture.

Q. This exhibit—let me see—“D.” That—is that a picture of the interior of the 69 Club, the main room? A. It is.

Q. You notice some beer cans down there in the left hand corner— (Interrupted.)

Mr. Hepp: I object to this. I think counsel ought to ask this witness what he sees in that picture— (Interrupted.)

Mr. Hurley: Alright.

Mr. Hepp (Continuing): —instead of saying “You notice these beer cans” and “Isn’t this an interior of the Club 69,” question of that order. I object to the question.

Mr. Hurley: Alright, I will withdraw it.

Q. (By Mr. Hurley): What do you see in the picture on the lower left hand corner?

A. I see beer cans around there.

Q. Were they there when the officers came out there? [254] A. No, they wasn’t.

Q. Where did—how did they get there?

A. Mr. Barber put them down there.

Q. Just before this picture was taken?

(Testimony of Elgie Fields.)

A. That's right.

Mr. Hurley: That's all. You may cross-examine.

Cross-Examination

By Mr. Hepp:

Q. By whom are you employed, Mr. Fields?

A. At present I am unemployed.

Q. How long has it been since you have worked?

A. Oh, about 3 weeks.

Q. Where did you work last?

A. I worked out on the building of a house.

Q. Is that Mr. Wright's house?

A. Yeah, I was helping the carpenter.

Q. Oh, I see. How long has it been since you have had a regular job?

A. I am a disabled veteran.

Q. Does that interfere with your working for Mr. Wright, Mr. Fields?

A. Well, the kind of work I am doing, I am not doing hard work out there. I just hand the carpenter what he wants. I [255] can't do physical hard work.

Q. How old are you? A. Twenty-eight.

Q. When did you say you came to Fairbanks?

A. When did I say? June 19th, 1950.

Q. That is of this year? A. That's right.

Q. Are you married? A. No, I'm not.

Q. How often did you do janitor work out at the Club 69, Mr. Fields?

A. I helped David every day.

(Testimony of Elgie Fields.)

Q. For how long?

A. Well, from the time I got there until he left.

Q. Did you go ahead and do the janitor work alone then after he left?

A. That's right.

Q. Are you still doing it?

A. No, I am not still doing it.

Q. When did you quit?

A. I quit when they closed the club up.

Q. When who closed the club up?

Mr. Hurley: Now, we object to that as incompetent, irrelevant and immaterial; not within the issues of the case. [256]

The Court: Objection sustained.

Q. (By Mr. Hepp): You stated that you didn't see anything else on the floor except what you had swept up, is that right?

A. That's right.

Q. See any marijuana in which you swept up?

A. Not that I know of. I wouldn't know it if I did see it. When we swept up that morning, Dave swept the main room and I swept the side room, see? Nothing on the floor but cigarettes and match sticks and beer cans.

Q. And beer cans?

A. That's right.

Q. How many beer cans on the floor?

A. Well, I couldn't estimate how many was on the floor.

Q. Oh, about how many?

A. I couldn't even estimate.

Q. Five, fifty?

A. I would say—I couldn't make an estimation.

Q. Quite a big pile?

(Testimony of Elgie Fields.)

A. I couldn't estimate how many was on the floor.

Q. Do you know Opal Weldon?

A. Well, I have met her since I have been here.

Q. You say you were there at the Club 69 when the officers came? A. Yes, I was. [257]

Q. Where was Opal when the officers came?

A. Where she was, I don't know.

Q. Did you see her about that time?

A. No, I didn't.

Q. Did you see her shortly after that?

A. Yes, I saw her when the fellow got out of the room.

Q. When the fellow got out of the room?

A. Yes. He said he got it out of the room. You see, I was in the club part—— (Interrupted.)

Q. Was that fellow her husband?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial; not within the issues of the case.

The Court: Objection sustained.

Q. (By Mr. Hepp): You say you had helped David Weldon scrub the floor, is that right?

A. Sweep, scrub and wax.

Q. Where was—do you know where David Weldon was when the officers came?

A. No, I don't.

Q. Did you see him around there?

A. When the officers came?

Q. Yes. A. No, I didn't. [258]

Q. Or shortly after that?

(Testimony of Elgie Fields.)

A. Yeah, he came up shortly after.

Q. Where did he come from? Do you know?

A. I couldn't tell you.

Q. From the outside?

A. Yeah, he came in from the outside.

Q. Where did you say you're living now?

A. 521-4th street.

Q. How long have you been living there?

A. Oh, about a week.

Q. Where did you live before that time?

A. I stayed on 23rd street.

Q. On what property did you stay on out there?

A. I stayed out there in the trailer.

Q. Whose trailer? A. Ray's trailer.

Mr. Hepp: I have no further questions.

Redirect Examination

By Mr. Hurley:

Q. What—you say you worked over on Wright's house where he is building a home?

A. I did.

Q. And what was he doing, Mr. Wright?

A. He would come over there and help us nail and putting [259] up boards.

Q. How long would he work at a time?

A. Sometimes he stayed all day with us.

Q. Work all day? A. That's right.

Q. It was his house? A. That's right.

Q. And he worked right along with the other men? A. Right along with us.

Mr. Hurley: That's all.

Mr. Hepp: That's all.

(The witness at this time left the witness stand.)

Mr. Hurley: I would like to call Oliver Richardson and I don't think he is in here yet. We tried to get him. That was one of the men that they testified had bought cigarettes or smoked cigarettes or something of the kind and I didn't know that his evidence was going to be necessary in this case and I want to put him on the witness stand. There is one other witness that I would like to get a hold of, Mr. Ripley. I think he is outside. He is in Los Angeles. I won't be able to get him at all but I want to put on Oliver Richardson.

Mr. Hepp: Is that the only other witness, Mr. Hurley? [260]

Mr. Hurley: Well, I think I may have one other. I am not sure. I have got to check these myself to see.

The Court: But you have a witness here you can put on now?

Mr. Hurley: I don't think so. No. I may have one more witness or two. If I do, they will be very short and I have got to have this man Oliver Richardson and I would like to talk to him before putting him on.

The Court: I don't like to waste this time.

Mr. Hurley: I don't want to, your Honor, but it won't take over five minutes to put—I may have one other witness.

The Court: Do you have a witness still here that you can put on to utilize this time?

Mr. Hurley: Oh, I might—Willa May Walters, is she here? Willa May Walters? Yeah, I will put Willa May Walters on. I didn't know she was up here, your Honor.

WILLA MAY WALTERS

called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hurley:

Q. What is your name?

A. Willa May Walters.

Q. Where do you live, Mrs.—Miss or Mrs.?

A. Miss.

Q. Miss Walters, where do you live?

A. 23rd and Mercer.

Q. Did you hear the testimony of the government's witness—witnesses in regard to your smoking marijuana cigarettes, Miss Walters?

A. I did.

Q. And did you ever smoke any marijuana cigarettes out at the 69 Club?

A. I never did.

Q. Did you ever see any marijuana cigarettes out at the 69 Club? A. Never.

Q. Did you ever see any marijuana out at the 69 Club? A. Never.

Q. Did you ever see any in the possession of either Mrs. Wright or Mr. Wright?

(Testimony of Willa May Walters.)

A. No, I didn't.

Q. Do you know Vanada Donaby?

A. I do.

Q. How long have you known her? [262]

A. Since sometime in May.

Q. Did you ever (pause)—did you ever have a conversation with Vanada Donaby when you were out at the 69 Club in regard to a man by the name—that went by the name of “W.O.”?

A. I—— (Interrupted.)

Mr. Hepp: Just a minute. I object. Just “yes” or “no” on that.

Witness: I did.

Q. (By Mr. Hurley): And when was this conversation? A. At the present, I can't recall.

Q. Well, about when was it?

A. Oh, it was just a few weeks before she was ready to leave.

Q. What?

A. A few weeks before she was ready to leave, maybe a couple or three.

Q. Before she left? A. Yeah.

Q. And who was present when you talked?

A. Just she and I.

Q. And what did she tell you in regard to this man by the name of “W.O.”?

A. The way the conversation came up, she was telling me how much she loved him and what happened to her while she [263] wasn't with him. She said he had went to Frisco and—— (Interrupted.)

Mr. Hepp: I believe I am going to object to this,

(Testimony of Willa May Walters.)

your Honor. I don't know how pertinent it is to the issues here. I don't know whether counsel is trying to use this as an impeachment of one of the witnesses or not. It might have a theory of admissibility on that ground. It seems to be very remote and disconnected with the issues of this trial. I am going to object to it, your Honor.

Mr. Hurley: I asked her that impeaching question if she didn't have this conversation with this witness in regard to this man she was with that went by the name of "W.O." and if he wasn't convicted of a dope charge and if she wasn't interviewed by the F. B. I. and didn't tell this witness that and she said no.

The Court: This witness said no?

Mr. Hurley: No. Vanada Donaby said no. This witness—I am asking her what the conversation was that I examined the other witness about for the purpose of impeachment.

Mr. Hepp: I believe, your Honor, that in matters of impeachment as to reputation of character for truth and veracity and honesty, I don't believe that it exceeds that scope. I don't know of any impeaching process [264] that you can bring everything in whether it is relevant or pertinent to the issues or not.

The Court: I believe you can ask her what conversation took place.

Mr. Hurley: I asked her where it was and who was present.

The Court: A witness may be impeached by

(Testimony of Willa May Walters.)

showing declaratory statements at another time. You should detail to the witness the conversation claimed and ask the witness whether or not she made that statement at a designated time and place with those present being named.

Q. (By Mr. Hurley): Did this Vanada Donaby, at the time and place you stated, did she talk to you about this man, "W.O."? Did she tell you that she had been living with this man; that this man was up on a narcotic charge and that the F. B. I. officers had interviewed her in regard to it?

A. Yes.

Q. She told you that?

A. She told me that.

Mr. Hurley: That's all, you may cross-examine.

Cross-Examination

Q. (By Mr. Hepp): How long have you known the Wrights?

A. Since January 7th, 1950.

Q. How did you come to know them?

A. I came to Fairbanks.

Q. Did you live out at their place?

A. Yes.

Q. Did you work out at their place?

A. I did.

Q. What kind of work did you do there?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial; not within the issues of the—— (Interrupted.)

The Court: Objection overruled.

(Testimony of Willa May Walters.)

Q. (By Mr. Hepp): What kind of work did you do out there then?

A. I worked for Mrs. Wright in the house, whatever she had to do, as maid work, whatever you may call that.

Q. Maid work? A. That's all.

Q. Didn't you testify in a previous trial that you were a prostitute out there?

A. I had my own cabin rented, and what I do in my cabin don't concern anyone else.

Q. Did you ever work out at the Club 69——
(Interrupted.) [266]

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial. She has already answered the question.

The Court: Objection overruled.

Mr. Hurley: Save an exception.

Q. (By Mr. Hepp): Did you ever work out at the Club 69 as a prostitute, Willa May?

A. I never did.

Q. Did you ever work in any of the buildings that are adjacent to the Club 69 as a prostitute?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial; not within the issues of the case.

The Court: Objection overruled.

Mr. Hurley: Save an exception.

Q. (By Mr. Hepp): Would you answer the question, please?

A. Would you ask me again, please?

Q. Did you ever work as a prostitute in any

(Testimony of Willa May Walters.)

of the buildings that are adjacent to the Cotton Club—or excuse me—the Club 69?

A. I did not.

Q. Are you familiar with the premises of the Club 69?

A. Yes. I have been in and out there. [267]

Q. How many buildings are there out there on those premises?

A. (Pause.) Well, three or four, I guess.

Q. How many buildings have you been in and out there?

A. Well, I have been in all of them doing maid work.

Q. Well, then, you should know how many buildings are there, isn't that right?

A. One is burned down and one is moved away so that's why I can't think right now. I don't remember just what is out there.

Q. How many buildings were there out there in January?

A. I wasn't at the Club 69 in January.

Q. When did you first go to the Club 69?

A. I don't recall what day it was.

Q. Do you recall the month? A. No.

Q. Was it in the spring?

A. I don't remember.

Q. Was it in the summer?

A. I don't remember (laughing).

Q. Was it in 1950? A. It was 1950.

Q. Did you—but you don't—can't remember whether it was in the spring or summer?

(Testimony of Willa May Walters.)

A. I sure can't. [268]

Q. And whether it was January or August?

A. I don't know.

Q. Were you out there at the premises of the 6—Club 69 when the officers came out there on August 4th? A. I was not.

Q. When did you first learn about that?

A. Oh, a few days later.

Q. Where were you living then, Willa May?

A. 23rd and Mercer.

Q. How long had you lived at 23rd and Mercer at that time? A. I don't remember just now.

Q. More than a week, though?

A. Oh, sure.

Q. More than 2 weeks?

A. I don't remember just how long, but I have been there for a while, quite a while.

Q. How long did you work for Mrs. Wright?

A. I don't remember just now.

Q. Was it more than a month?

A. I don't remember.

Q. More than 6 months?

A. I don't remember.

Q. Which would come closer, one month or 6 months?

A. I still say I don't remember. You want me to tell [269] you a lie?

Q. No, I don't want you to tell me a lie.

A. All right, I don't remember.

Q. Have you worked for anyone besides Mrs. Wright since you have been in Fairbanks?

(Testimony of Willa May Walters.)

A. Yes. I sometime go down to the Clark Rooms and clean up.

Mr. Hurley: What was that answer?

Witness: I sometimes go down to the Clark Rooms and clean up. Sometimes I go to the Clark Rooms and clean up.

Q. (By Mr. Hepp): You don't remember how many times you were down there?

A. Oh, no. I wasn't keeping up with the times that I went.

Q. Would you say it was few or many?

A. Quite a few times.

Q. Who did you work for when you went to the Clark Rooms to clean up? A. Jack Glass.

Q. When did you first meet Jack Glass?

A. When did I first meet Jack Glass? In '45 in Denver, Colorado.

Q. That was before you came here?

A. Yes, we were friends. [270]

Q. How long—do you know how long he has had the Clark Rooms? A. No.

Q. He has had them as long as you have known him up here?

A. Ever since I first seen him he did.

Q. Have you ever been steadily employed at the Clark Rooms?

A. Well, just doing maid work, day work.

Q. Has that been steady or just— (Interrupted.) A. When they needed me.

Q. Once a week maybe?

A. Twice. Maybe two or three times a week.

(Testimony of Willa May Walters.)

Q. How much would they pay you for that?

A. He paid me dollar and a half an hour.

Q. And you would work how many hours?

A. According to how many hours it took me to do the work there.

Q. What would it average?

A. Well, I don't remember.

Q. Did you ever work for anyone besides Glass?

A. Nobody but Jack Glass and Mrs. Wright.

Q. Did Mrs. Wright pay you wages?

A. Yes. Sure she did.

Q. You remember that?

A. Of course I remember that. [271]

Q. How much did she pay you a week?

A. Fifty dollars.

Q. Board and room, too? A. Yes.

Q. What were your duties?

A. Maid work. I told you.

Q. Well, I am asking you again. You worked steadily out there, did you, for \$50 a week?

A. Yes, I did.

Q. For approximately how long?

A. I don't remember.

Q. When did you start?

A. I don't remember that.

Q. Was it in January of this year when you first came up here? A. I don't remember.

Q. When you first came to Fairbanks, what was the first job you had, if you remember?

A. I don't remember.

(Testimony of Willa May Walters.)

Q. Do you remember whether you went to work when you came to Fairbanks?

A. (Laughing.) Oh, I just said I don't remember.

Q. But you have never worked out at the Club 69 as a prostitute? A. I never did. [272]

Q. Do you know a place called the Cotton Club?

A. That's where I had my cabin rented.

Q. Pardon?

A. That's where I had my cabin rented.

Q. Who owns the Cotton Club?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial; not within the issues of this case.

The Court: What is the relevancy of it?

Mr. Hepp: I believe her answer would establish that, your Honor.

The Court: Objection is sustained.

Q. (By Mr. Hepp): Miss Walter, is that the way you pronounce your name, Walter?

A. Walters.

Q. Have you been a prostitute since you came to Fairbanks?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial and not proper cross-examination.

The Court: Objection overruled.

Mr. Hurley: I would like to warn the witness that she doesn't have to answer if she don't want to.

Mr. Hepp: Your Honor, I don't believe [273] that's a crime under our code. I don't think she can claim self-incrimination.

(Testimony of Willa May Walters.)

Q. (By Mr. Hepp): Would you answer the question, please? A. (No answer.)

Q. Do you refuse to answer that question, Miss Walters? A. (Pause.) I do.

Mr. Hepp: That's all.

(At this time, the witness left the witness stand.)

Mr. Hurley: Now, if the Court please, in regard to Oliver Richardson, I have been unable to get him here. He is—just as soon as I found out that he had been testified about in regard to something we did not know anything about, I sent for him and I have been unable to get him in here and I understand he is out at the base. He works out at the base.

The Court: You can have him here tomorrow?

Mr. Hurley: Sure we can.

The Court: We will take an adjournment in a few minutes. Upon adjournment, the jury will be excused until ten o'clock tomorrow morning.

(At this time, the Court duly admonished the jury and at 4:50 p.m., November 9, 1950, the trial of [274] this cause was adjourned until ten o'clock a.m., November 10, 1950.)

Be It Remembered, that upon the 10th day of November, 1950, at the hour of 10 o'clock a.m., came the defendants in person and by their attorneys and the trial of this cause was resumed; the Honorable Harry E. Pratt, District Judge, presiding:

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

Clerk of the Court: They're all present, your Honor.

The Court: Jurors not engaged in the trial of this case will be excused until Monday morning at ten o'clock. Counsel ready to proceed with the trial of this case, 1509 criminal?

Mr. Hepp: Ready.

Mr. Benton: Yes, your Honor. I believe Mr. Hurley is not on hand. He will be here in about half a minute.

The Court: Call your witness.

Mr. Hurley: Yes, we are ready, your Honor. I would like to recall Mrs. Wright. You have already been sworn. Just take the stand. [275]

VERNESTINE WRIGHT

recalled as a witness in her own behalf, having been previously sworn, testified as follows:

Redirect Examination

By Mr. Hurley:

Q. Do you know where the cesspool was dug out at the—near the trailer that you lived in?

A. I do.

Q. And what direction was the cesspool from the trailer, Mrs. Wright?

A. North, facing north from the trailer.

Q. About how far north of the trailer was it?

(Testimony of Vernestine Wright.)

A. About 12 feet.

Q. And how many doors is there to the trailer?

A. Two.

Q. And what direction does the front door face?

A. East.

Q. East. And you say the cesspool is north of the trailer, is that right? A. Yes.

Q. And how big is the trailer?

A. It is 8 feet in width and 22 feet in length.

Q. And does the house—the front door open from the side, the long side of the trailer or from the end? A. From the long side. [276]

Q. I see. And you heard the testimony of Mr. Jones here, did you? A. I did.

Q. William Jones I think it is. And if he was working—(pause)—who was it that testified in regard to digging that hole, was that Jones or Woods?

A. Mr. Woods.

Q. Oh, Woods. And if he was working on the cesspool, would it have been possible, where it is located there, would it have been possible for him to see in the front door of your trailer?

Mr. Hepp: Just a minute. I object to that question unless it is established as to what sphere of work on the cesspool it could be. The work could have taken a workman 20 feet away from the actual place he was digging or something like that or getting tools from a work bench or something like that. I believe that question is very indefinite and can't possibly be answered without calling for a

(Testimony of Vernestine Wright.)

rash conclusion on the part of this witness and I object to it for that reason.

Mr. Hurley: His testimony, your Honor, was that he was digging this cesspool right in front of the trailer.

The Court: There would have to be some way to get things to the cesspool, wouldn't it? [277]

Mr. Hurley: He didn't say anything about getting things to the cesspool. He says he was working on the cesspool.

Mr. Hepp: Your Honor, he didn't say he was digging at the cesspool at that time. He says he was working around there and his work took him over close to the door. His own testimony stated the cesspool wasn't in front of the door.

Mr. Hurley: That wasn't the testimony.

Mr. Hepp: I would be happy to have the record read.

The Court: Well, we don't have time for that. I will allow the question if she can answer.

Q. (By Mr. Hurley): Just answer—if he was working where he said he was on the cesspool, would it have been possible for him to see the front door of your wanigan?

A. Mr. Hurley, if he had been working on any part of the north side he couldn't have seen the front—he couldn't have seen in the front door of the trailer. It was positively impossible.

Q. How long, Mrs. Wright, had you been living out there before the officers came out with this search warrant?

(Testimony of Vernestine Wright.)

A. I had been living out there since the first of May.

Q. And did you ever have any marijuana cigarettes in the [278] trailer or any place else out there?

A. I have never seen marijuana.

Q. Did any one ever come out there and buy any? A. Not from me.

Q. Did they ever buy any from your husband that you know of?

A. From my knowledge, no one ever bought or sold marijuana at the 69 Club.

Mr. Hurley: That's all. You may cross-examine.

Mr. Hepp: No questions.

Mr. Hurley: If the court please, we were unable to locate the witness that they testified about smoking marijuana cigarettes. We know he is at the base and we did everything we could to try to locate him and have been unable to get him here. I didn't issue a subpoena because I thought we could locate him ourselves probably faster than the officers could and I would like to have his testimony, but I have been unable to find out—unable to get a hold of him.

The Court: Call your next witness.

Mr. Hurley: And so with that reservation, we rest the defense, your Honor.

The Court: Any rebuttal?

Mr. Hepp: No, I have no rebuttal, your [279] Honor.

The Court: Very well. How much time do you want for argument?

Mr. Hepp: Well, an hour will be ample for me, your Honor.

Mr. Hurley: I think that will be sufficient.

The Court: Satisfactory then, an hour to the side. Very well, commence.

(At this time, Mr. Hepp presented argument to the jury.)

Mr. Hurley: May it please the Court, I would like to have an opportunity to read the court's instructions before I am required to make an argument in this case. From the remarks of counsel, I don't know just exactly what the instructions are going to be and I don't think it is fair to the defendants to attempt to argue the case without seeing them.

The Court: If you wish to come forward, I will tell you what they contain. They're not ready yet and the law doesn't require me to have them until after the arguments.

Mr. Hurley: I understand, your Honor, but in this particular case—— (Interrupted.)

The Court: Come forward, I will tell [280] you.

(The following proceedings were had out of the presence and hearing of the jury.)

The Court: Any particular point you want to know?

Mr. Hurley: Yes, I want to know about the limitation of the evidence as it was introduced by Mr. Hepp in regard to other crimes.

The Court: Well, I wasn't planning on any limitation—— (Interrupted.)

Mr. Hurley: And they can find him guilty on any of the evidence that has been introduced, either by the search warrant or—— (Interrupted.)

The Court: The indictment charges that on a certain day and I tell the jury that if they believe that each allegation in the indictment was proved, they should find him guilty and if they have a reasonable doubt about the—— (Interrupted.)

Mr. Hurley: And the time element is not limited to the actual time that the officers were there?

The Court: It is limited to the 4th day of August, yes.

Mr. Hurley: And they can find they had it out there before that?

The Court: They wouldn't, no. [281]

Mr. Hurley: Would it be limited to that evidence or be limited to the plaintiff showing intent or will it be—— (Interrupted.)

The Court: Whatever—— (Interrupted.)

Mr. Hurley: Even in the cases where other crimes are admissible, it is only admissible for absolutely one purpose and—— (Interrupted.)

The Court: If you have an instruction to present, I will consider it.

Mr. Hurley: I haven't any and I haven't had time to prepare any. I didn't know—this kind of came up suddenly.

The Court: Was there any other point that you wanted to know about?

Mr. Hurley: And they can convict on that other evidence?

The Court: It simply tells them that there must be—they must find that on the 4th day of August they had marijuana out there; on the 4th; not any other day.

Mr. Hurley: It is not any time before the——
(Interrupted.)

The Court: No, no, just the one date.

Mr. Hurley: Could I have about a 15-minute recess before I argue?

The Court: I will give you 10 minutes. [282]

Mr. Hurley: All right.

(The following proceedings were had in the presence and hearing of the jury.)

The Court: We will take a 10-minute recess.

(At the time, the Court again duly admonished the jury and a 10-minute recess was taken.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

Clerk of the Court: They're all present, your Honor.

(At this time, Mr. Hurley presented argument to the jury on behalf of the defendants.)

(At the conclusion of Mr. Hurley's argument, Mr. Benton presented further argument to the jury on behalf of the defendants.)

(At the conclusion of Mr. Benton's argument, Mr. Hepp presented further argument to the jury on behalf of the government.)

The Court: In a moment, we are going to take a recess until two o'clock at which time I will instruct the jury.

(At this time, the trial of this cause was recessed until 2 o'clock p.m., and the Court duly admonished [283] the jury.)

(At the time of 2 p.m., the trial of this cause was reconvened.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

Clerk of the Court: They're all present, your Honor.

The Court: Counsel ready to proceed with the trial of this case?

Mr. Hurley: We are ready, your Honor.

Mr. Hepp: Ready, your Honor.

The Court: (At this time, the Court read the instructions to the jury as follows:)

Members of the Jury

1.

(a) The indictment in this case charges: That on the 4th day of August, 1950, in the Fourth Judicial Division, Territory of Alaska, Raymond Wright and Vernestine Wright feloniously and knowingly had possession of and under their control a narcotic

drug, to wit: marijuana. From the above, the jury will note that the possession of a narcotic drug mentioned in the indictment must be known to a defendant at the time and place mentioned in said indictment in order that he or she may be guilty of the crime charged. [284]

(b) 1. The jury is instructed that the Narcotic Drug Act of Alaska, in section 40-3-2, Alaska Compiled Laws Annotated, 1949, provides in substance, that it shall be unlawful for any person to possess or have under his control any narcotic drug, except as authorized by said act.

(2.) The jury is instructed that during the year 1950, neither of the defendants either jointly or separately was authorized pursuant to the provisions of said Narcotic Act to have possession or control of the narcotic drug marijuana.

2.

You are instructed that the indictment is a mere accusation and is not in itself any evidence of the defendants' guilt.

Each defendant has pleaded not guilty to the matters set forth in said indictment. That plea puts in issue every material allegation of the indictment and puts the burden of proof upon the plaintiff to prove every such allegation beyond a reasonable doubt. Each defendant is presumed to be innocent and until the plaintiff has proven every material allegation of said indictment beyond a reasonable doubt, each defendant is entitled to the continued benefit of the presumption of his innocence.

3.

The jury is instructed: That although the [285] defendants are charged jointly in the indictment, of the crime therein described, such charge should be regarded by the jury as a several and individual charge against each defendant. However, proof beyond a reasonable doubt that defendants at the time and place mentioned in the indictment, knowingly had joint possession and control of a narcotic drug, to wit: marijuana, would have the same effect as if such proof was that each defendant then and there knowingly had sole and separate possession and control of a narcotic drug, to wit: marijuana.

4.

The jury is instructed:

(a) That as to either of the defendants, if the jury finds that the evidence in this case has failed to prove beyond a reasonable doubt any allegation of said indictment, as mentioned in instruction number 1 (a) herein, the jury should find such defendant not guilty of the crime charged in the indictment.

(b) The jury is instructed that if they find, as to either of the defendants, that the evidence in this case proves beyond a reasonable doubt that said defendant is guilty of the crime charged in the indictment and as set forth in instruction number 1 (a) hereof, the jury should find such defendant guilty of the crime charged in the indictment herein. [286]

5.

You are instructed that, as used with reference to the case now on trial:

The word "wilfully" means intentionally and deliberately, and implies knowledge on the part of the wrongdoer.

The word "unlawfully" means forbidden by law.

The word "feloniously" means the unlawful doing of an act which may be punished by imprisonment in the penitentiary, such as the crime charged in this case. The word "unlawfully" is included in the word "feloniously."

6.

In regard to the term "reasonable doubt," as used in these instructions and as defined by law, you are instructed as follows:

(a) If, after considering all of the evidence in the case, there is in the minds of the jury a fixed conviction that the defendant is guilty, the jury would be justified in considering that there is no reasonable doubt in the minds of the jury in the sense in which the term is used in these instructions.

(b) A doubt, to be such a reasonable doubt, must have an actual and substantial basis and not be a mere fanciful speculation. It cannot be a reasonable doubt if it [287] ignores a reasonable interpretation of the evidence. The rule of law as to a reasonable doubt is a practical rule for the guidance of practical jurors when engaged in the solemn duty of assisting in the administration of justice. To prove a proposition beyond a reason-

able doubt, the evidence must be such that it would convince a reasonably prudent man of its truth to such a degree of certainty that he would feel like acting upon such conviction in matters of the highest importance to his own personal interests.

In other words, a reasonable doubt is one which is reasonable in view of all of the evidence and such as arises upon an impartial comparison and consideration of all evidence and prevents the jury from being able to say candidly and truthfully that they have an abiding conviction of the defendant's guilt.

7.

The jury is instructed that they should bring to bear upon the consideration of the evidence or lack of evidence in this case all of the common knowledge of men and affairs which they, as reasonable human beings, have and exercise in every day affairs of life. Accordingly, you should draw from the evidence or lack of evidence in this case all deductions which appear to you to flow logically from the evidence or lack of evidence. Whatever verdict is warranted by the evidence under the instructions [288] of the Court, you should return as you have sworn to do.

8.

(a) You are instructed that a person charged with the commission of a crime shall at her own request, but not otherwise, be deemed a competent witness in her own behalf—the credit to be given to her testimony being left solely to the jury under the instructions of the court.

You are instructed that in this case the credit to be given to the testimony of the defendant, Vernestine Wright, who has voluntarily offered herself as a witness and testified in her own behalf, is left solely to you and you should give it the same fair and candid consideration as you do the testimony of other witnesses in the case, but you have a right to take into consideration the interest of the defendant, Vernestine Wright, in the result of the trial as affecting her credibility.

(b) You are instructed that in the trial of a criminal case, the person accused is a competent witness in his own behalf, at his own request, but not otherwise, the credit to be given to his testimony being left solely to the jury under the instructions of the court. If the defendant does not choose to appear as a witness in his own behalf, the laws of Alaska provide that his waiver to so testify shall not create any presumption against him, and you will, therefore, in this case not permit the [289] failure of the defendant, Raymond Wright, to testify to create any presumption in your minds against his innocence.

9.

In determining the credit you will give to a witness and the weight and value you will attach to his testimony you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to or feeling for or against any of the parties to the cause; the probability or improba-

bility of his statements; the opportunity he had to observe and to be informed and the inclination he evinced to speak the truth or otherwise as to matters within his knowledge. It is your duty to give to the testimony of each and every witness appearing before you such credit as you consider the same justly entitled to receive.

You are further instructed that in your consideration of the evidence in this case, you should analyze it in the light of the knowledge which your experience in life has given you, and you should draw from the evidence all logical and natural deductions and be governed accordingly.

10.

You are instructed that the laws of the Territory [290] of Alaska lay down the following general rules for your guidance as to the value of evidence, to wit:

1. That you are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying to your minds.

2. That a witness wilfully false in one part of his testimony may be distrusted in others.

3. That evidence is to be estimated not only by its own intrinsic weight, but also accordingly to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore,

4. That if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

5. That oral admissions of a party should be viewed with caution.

11.

You are instructed as follows:

1. That you should not consider any evidence sought to be introduced, but excluded by the court, nor should you consider any evidence that has been stricken from the record by the court; [291]

2. That it is manifestly impossible for the court to cover the law of this case in a few instructions and that, therefore, you should consider all the instructions together and not disconnectedly;

3. That wherever in these instructions the masculine is used, it shall be deemed to include the feminine, unless the context shows it to be inapplicable.

4. That you should endeavor to agree upon a verdict and should calmly reason with your fellows with the view of arriving at a verdict. You should not refuse to agree from pride of opinion, nor should you surrender any conscientious views founded on the evidence or lack of evidence.

5. That wherever in these instructions the singular is used, it shall be deemed to include the

plural, unless the context shows it to be inapplicable.

12.

You are instructed that there are two general classes of evidence, direct and circumstantial. Evidence as to the existence of the main fact in issue is direct evidence, while circumstantial evidence relates to the existence of facts which raise a logical inference as to the existence of the main fact in issue.

It is not necessary to prove the defendants' guilt by the testimony of eye witnesses who have seen the [292] offense committed, but such guilt may be established by facts and circumstances from which it may be reasonably and satisfactorily inferred, provided such facts and circumstances establish guilt beyond a reasonable doubt.

You are instructed that circumstantial evidence is legal and competent evidence, and, if it be of such a character as to exclude every other reasonable hypothesis than that of the guilt of the defendant, then it is sufficient to authorize a conviction; in other words, such evidence is sufficient to warrant a conviction when it convinces the minds of the jury of the guilt of the accused beyond a reasonable doubt.

Circumstantial evidence is to be regarded by the jury in all cases where it is offered. Sometimes it is quite as convincing in its power as the direct and positive evidence of eye witnesses, and when it is strong and satisfactory the jury should so consider it, neither enlarging or belittling its force,

but the circumstances when taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused committed the crime charged. And it is an invariable rule of law that such facts and circumstances must be shown as are consistent with the guilt of the person charged and as cannot on any reasonable theory, be true and [293] the person charged be innocent.

13.

Herewith I hand you a form of verdict which is more or less self-explanatory. In the first blank you should insert the words "guilty" or "not guilty" according to your finding as to the defendant Raymond Wright. In the second blank, you should insert the words "guilty" or "not guilty" according to your finding as to the defendant, Verneestine Wright.

You should elect a foreman and by him or her sign the verdict upon which you unanimously agree, and return it into the court as your verdict.

Herewith I hand you these instructions for your guidance, together with the above-mentioned form of verdict, the indictment in this case, and the exhibits that have been introduced in evidence. Return all of these into court with your verdict.

Dated at Fairbanks, Alaska, this 10th day of November, 1950.

HARRY E. PRATT,
District Judge.

(Following the reading of the instructions to the jury by the court, the following proceedings were had.)

The Court: Come forward at this time [294] if you wish.

(The following proceedings were had out of the presence and hearing of the jury.)

Mr. Hurley: The—— (Interrupted.)

The Court: I would suggest that you first mention the instruction just so I can get that before you start talking.

Mr. Hurley: I object—— (Interrupted.)

The Court: Which number?

Mr. Hurley: (Continuing): ——to instruction number 1 (a) for the reason that the instruction is not sufficiently clear and does not impress upon the jury the fact that the jury cannot convict the defendant upon evidence other than the evidence introduced which had to do with the 4th day of August, 1950; and for the further reason that there is no instruction included in all of the instructions to—in regard to the testimony that was admitted in evidence in regard to crimes testified to by witnesses which they testified happened prior to the 4th day of August, 1950. We feel that this instruction is not sufficient and the jury may be misled by reason of the fact of the admission of evidence in regard to the commission of other crimes prior to the time charged in the indictment. It is our contention that it should be made clear to the jury that if they

do not believe that on this date that the defendants wilfully and [295] knowingly and feloniously had in their possession marijuana, they should vote for a verdict of not guilty.

Now, as to instruction number 1, paragraph 2, I object to the instruction that during the year 1950 neither of the defendants were authorized to have possession or control of a narcotic drug, marijuana, because there is no evidence in regard to that.

I object to instruction number 3 in regard to the joint possession and control of a narcotic drug, to wit: marijuana, for the reason that it is not warranted by the evidence and there is no evidence that Mr. Wright was present or that he had any knowledge regarding said possession of said drug other than except the testimony of witnesses who were testifying about another offense.

We object to instruction number 4, paragraph (b), for the reason that it is not clear and merely refers to the crime charged in the indictment as set forth in instruction number 1 (a), but not brought to the attention of the jury that they have no right to convict on the testimony of the witnesses who have testified in regard to prior and previous crimes.

I object to that part of instruction number 6 in the next to the last line of said instruction under paragraph (b) in which it says that "upon an impartial comparison and consideration of all evidence and prevents the jury from [296] being able to say candidly and truthfully that they have an abiding conviction of the defendants' guilt," be-

cause it leaves out that the law requires that they must have an abiding conviction to a moral certainty.

I object to instruction number 12 in regard to circumstantial evidence for the reason there is no circumstantial evidence that has been introduced in this case that has been restricted by the instructions of the court.

The evidence shows that certain officers went out and exercised a search warrant and found what they claim to be marijuana in a public place and owned by the defendants. There is no attempt in instruction number 12 to limit what might be considered as circumstantial evidence or to give the defendants the benefit of the law and therefore the instruction is not applicable to this case.

The Court: Objections will be overruled.

(The following proceedings were had in the presence and hearing of the jury.)

The Court: The jury may retire in the custody of the bailiffs.

(Annella Davis, Martin Urie and William Sexton were duly sworn as bailiffs and at 2:35 p.m., the jury, in charge of its sworn bailiffs, retired to enter upon its deliberation.) [297]

Reporter's Certificate

United States of America,
Territory of Alaska—ss.

I, Charles Belida, Official Court Stenographer for the above-named court, do hereby certify,

That the foregoing pages numbered 1 through 297, inclusive, constitute a full, true, complete and accurate transcript of my shorthand notes.

That my shorthand notes were taken at the trial of the above-named cause upon the 7th, 8th, 9th and 10th days of November, 1950, in open court and that I reported in shorthand all of the oral proceedings had at the time of trial.

Dated at Fairbanks, Alaska, this 3rd day of February, 1951.

/s/ CHARLES BELIDA,
Official Court Stenographer.

Sworn and subscribed to before me this 3rd day of February, 1951.

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

[Endorsed]: Filed February 3, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings as per Praeceptum for Transcript of Record by Appellants in the above-entitled cause, viz.:

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13. Transcript of Testimony and Trial (Pgs. 1 to 297)

14. Brown Manilla Envelope containing all Plaintiff's Exhibits.

Witness my hand and the seal of the above-entitled Court, this 23rd day of February, 1951.

[Seal] /s/ JOHN B. HALL,

Clerk of the District Court, Fourth Judicial Division, Territory of Alaska.

[Endorsed]: No. 12869. United States Court of Appeals for the Ninth Circuit. Raymond Wright, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Fourth Division.

Filed February 26, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit
No. 12869

RAYMOND WRIGHT, et al.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Comes now the Appellant above named by his attorneys, Julien A. Hurley and Quincy W. Benton, and respectfully requests and designates the entire record including all the testimony be printed for submission to the Court in the above-entitled criminal action.

The points to be relied upon by Appellant are as follows:

1. Errors of the Court in admitting evidence offered by Appellee which was objected to by Appellant and admitted over the objections of Appellant and which evidence was incompetent, irrelevant and immaterial and which was prejudicial to the rights of Appellant.

2. Testimony of Appellant which was offered in evidence and which was objected to by attorney for Appellee and which was excluded by the Court which under the law was admissible. Rulings of the Court on such objections refers not only to direct evidence but to cross-examination of Appellee's witnesses.

3. Error of the Court in admitting evidence of crimes and misdemeanors in regard to which witnesses were allowed to testify which were not included in the crime charged in the Indictment and which were inadmissible and which resulted in the conviction of the Appellant on crimes not charged in the Indictment.

4. Errors of the Court in instructing of the jury as to the law of the case and which instructions were objected and excepted to by the Appellant, the reasons being stated why they were erroneous by the attorneys for Appellant.

5. Error of the Court in denying Appellant's motion for a change of venue.

6. Error of the Court in denying Appellant's motion for an instructed verdict and in reopening the case over the objection of Appellant in order for Appellee to introduce evidence of crimes not charged in the Indictment which were inadmissible under the correct rules of law.

That the only copy of the transcript and the record has been sent to San Francisco for printing and the points relied upon will be more fully defined and set forth in Appellant's Brief.

/s/ JULIEN A. HURLEY,

/s/ QUINCY BENTON,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 5, 1951.

No. 12,869

IN THE

United States Court of Appeals
For the Ninth Circuit

RAYMOND WRIGHT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

JULIEN A. HURLEY,

Fairbanks, Alaska,

Attorney for Appellant.



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No. 12,869

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RAYMOND WRIGHT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT.

This is an appeal by the defendant, Raymond Wright, from a judgment of conviction of the District Court for the District of Alaska, Fourth Division, under which appellant was convicted of the crime of the illegal and felonious possession and control of a narcotic drug commonly referred to as marihuana in violation of Section 40-3-2 of the Alaska Compiled Laws Annotated 1949.

A search was made of the building and premises near Fairbanks, Alaska, known as the 69 Club and evidence was introduced that 16 cigarettes containing marihuana were found on the floor of the public room of said club behind a chair, and evidence was

also introduced, over the objection of appellant, that some tobacco cans were found in the grass in the vicinity of said building which contained a small portion of marihuana. No attempt was made to show that the appellant, Raymond Wright, owned said club and the direct and undisputed evidence of Vernestine Wright was to the effect that she was the owner of said club. No attempt was made to show who was the owner of said land where the cans were found in the grass in the vicinity of said premises.

Evidence was admitted, over the objection of appellant, that both of the defendants prior to the 4th day of August, 1950, had sold marihuana. This evidence was admitted after it had been first excluded by the Court and after hearing argument by counsel. The purpose for which this evidence was admitted was never explained to the jury, although the appellant objected to its admission for the reason that it was inadmissible for any purpose, and after the Court had admitted the evidence it was called to the attention of the Court that if it were admissible for any purpose it was the duty of the Court to instruct the jury and limit the evidence to the purpose for which it was introduced. But this the Court refused to do. (T.R. pp. 245, 246, 247.)

POINTS AND AUTHORITIES.

“Where on cross-examination of accused, charged with selling narcotics at a specific time and place, he was asked whether or not he had

been engaged in business of selling narcotics, which was entirely collateral to the matter with which he was charged, his reply thereto, denying such fact, bound the prosecution, and it was error to permit prosecution to offer rebuttal evidence that defendant had been so engaged."

"(4) The effect of the admission of the testimony so complained of was to show or tend to show against the accused the commission of crimes independent of that for which he was on trial. With certain exceptions not applicable here, it is the well-settled rule that this cannot be done. *Boyd v. United States*, 12 S. Ct. 292, 142 U.S. 450, 35 L. Ed. 1077; *Newman v. United States (C.C.A.)* 289 F. 712. In *People v. Molineux*, the court said: 'This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta.' "

Smith v. United States, 10 F. (2d) 787, 788.

"In the civil law and very early in the common law, evidence of other crimes was admitted, on the theory that a person who has committed one crime is apt to commit another. The inference is so slight, the unfairness to the defendant so emphasized, the difficulty and delay attendant upon trying several cases at one time so great, and the confusion of the jury so likely, that for more than 200 years it has been the rule that evidence of other crimes is not admissible."

MacLafferty v. United States, 77 F. (2d) 719;

Cucchia v. United States, 17 F. (2d) 86;

Smith v. United States, 10 F. (2d) 787;
Wigmore on Evidence (2d Ed.), Section 194;
 16 *C.J.* 586.

“The scope and purpose of testimony concerning similar offenses, has been laid down in the Supreme Court of the United States in the cases of *Boyd v. United States*, 142 U.S. 554, and *Hall v. United States*, 150 U.S. 76. Only an exceptional cases is the proof of such transactions admissible. Where the case falls within the exception the proof must be clear and convincing.”

Gart v. United States, 294 Fed. 66;
Marshall v. United States, 197 Fed. 511;
Fish v. United States, 215 Fed. 544;
Niederlucke et al. v. United States, 21 Fed. (2d) 51.

“In prosecutions for illegal sale, furnishing or possession of narcotics evidence of other offenses is inadmissible if it does not come within any recognized exception to the general rule excluding such evidence, as where the other offenses are only remotely connected with the offense prosecuted, or do not tend to prove accused’s guilt thereof.”

22 *C.J.S.* Sec. Q, p. 1156.

ARGUMENT.

In view of the Court’s refusal to limit the evidence of the commission of other crimes of which appellant had no notice and the Court’s Instructions No. 1, (b) (2) that neither of the defendants, either jointly or

separately, was authorized pursuant to the provisions of the said Narcotics Act to have possession or control of the narcotic drug marihuana, the jury could easily have found that the defendant was guilty because of sales of which the witnesses did not claim to know the names of the purchasers and which were not included in the charge contained in the indictment.

In view of the opinion of this Court in the case of *Smith v. United States*, it would seem that in a case for possession or sale of narcotics evidence of previous violations are not admissible. In this case the defendant was asked if he had ever engaged in the sale of narcotics prior to the date charged in the indictment and he testified that he had never sold narcotics. Over the objection of his attorney evidence was admitted of previous sales and the Court held that the government was bound by his testimony and that a case of this kind does not come within the exceptions relied upon by the United States Attorney in the case now before this Court.

The tobacco cans, which it was alleged contained a certain amount of marihuana and which were not found upon the premises of the defendant, or which if they were no attempt was made to prove that either one of the defendants owned the premises, were admitted over the objections of appellant. There was no evidence that either one of the defendants had ever been in possession of these cans and there was no evidence offered which tends to prove that either one of the defendants owned these premises where the cans were found in the grass. The cans were never

introduced in evidence and the final disposition of the cans were made by the government witness, Power G. Greer, when he testified that the cans were cut into pieces by his six-year-old son with a pair of scissors. (T.R. p. 49.)

Two of the witnesses who testified in regard to other crimes were witnesses who had been accused by appellant of stealing from him the sum of \$800.00 and they gave no information to the officials in regard to any of the acts which they claim had been committed by appellant until after their arrest, and the Court excluded the testimony both on cross-examination of these witnesses and upon the direct examination of appellant in regard to the transaction and which evidence was offered for the purpose of showing the feeling and motive of the witnesses who testified in regard to other crimes not charged in the indictment.

The appellant was given no time by the Court to produce evidence in regard to the other crimes in which evidence was offered over the objection of appellant to produce evidence to contradict the charges, and in not one case was the name of the purchasers disclosed. In other words, proof of sales was used by the Court notwithstanding the fact that the names of purchasers were not disclosed. And the evidence shows that the officers made no attempt to find out whether or not the evidence was true or false. No defendant in a case of this kind and with no chance to contradict the testimony could expect to be acquitted by a jury even though the evidence of the crime

charged in itself was insufficient to warrant a conviction, or at least to raise in the minds of the jurors a reasonable doubt as to the guilt of the accused.

In view of the Court's rulings in this case, the Court's instructions to which exceptions were taken, the refusal of the Court to even attempt to limit the evidence in regard to other crimes and to admit evidence of other crimes which according to all of the authorities was inadmissible, it would seem that the judgment of conviction should be reversed and a new trial ordered.

Dated, Fairbanks, Alaska,
July 6, 1951.

Respectfully submitted,
JULIEN A. HURLEY,
Attorney for Appellant.



No. 12,869

IN THE

United States Court of Appeals
For the Ninth Circuit

RAYMOND WRIGHT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

EVERETT W. HEPP,

United States Attorney,

HUBERT A. GILBERT,

Assistant United States Attorney,

Fourth Judicial Division, Territory of Alaska,

Attorneys for Appellee.

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No. 12,869

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RAYMOND WRIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

JURISDICTION.

This is an appeal from a judgment of the District Court for the Territory of Alaska, Fourth Division, sentencing the defendant to imprisonment for two years in the Federal Penitentiary at McNeil Island, Washington. Said judgment was entered on the 22nd day of November, 1950 (Tr. of R. 7), pursuant to a jury trial and verdict of "Guilty" (Tr. of R. 6) of the alleged crime of feloniously having in his possession and under his control a narcotic drug, to-wit, marijuana, as charged in the indictment (Tr. of R. 3) based on Title 40, Chapter 3, Section 2 of the Alaska Compiled Laws Annotated, 1949 (Volume 2, page 1104). Notice of appeal was filed the 27th day of November,

1950. The jurisdiction of the District Court was invoked under the Act of June 6, 1900, Chapter 786, 31 Stat. 322, as amended, 48 U.S.C., Section 101, likewise constituting Title 53, Chapter 1, Section 1, Alaska Compiled Laws Annotated, 1949. The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U.S.C., Section 225(a); now 28 U.S.C. New, Section 1291.

QUESTIONS RAISED.

Whether evidence of prior similar acts of the defendant was properly admitted by the trial Court; whether the Court improperly refused to limit by instruction such evidence to the purposes for which it was introduced; and whether the Court wrongfully excluded testimony, both on cross-examination of witnesses and direct examination of appellant, offered for the purpose of showing feeling and motive.

STATEMENT OF THE CASE.

On the 4th day of August, 1950, a group of law enforcement officials comprised of representatives of the United States Marshal's office, the United States Treasury Department, and the office of Special Investigation of the Military, searched the premises of a local building known as the "Club 69", located in the outskirts of Fairbanks, Alaska, pursuant to a search warrant issued for that purpose. The search was made

for narcotics. During the search sixteen marijuana filled cigarettes, bound together with a rubber band, were found behind an overstuffed chair located in the living room of the "Club", one pocket-sized tobacco can was found in a cabin situate immediately behind the "Club 69" and three tobacco cans were found in the grass approximately three or four feet west of the southernmost cabin located on the premises. The contents of the tobacco tins were examined by a chemist and found to be marijuana. The defendants, Raymond Wright and his wife, Vernestine Wright, were arrested and later indicted for the crime of feloniously possessing and having under their control a narcotic drug, to-wit, *cannabis sativa indica*, commonly referred to by the name of "marijuana".

During the course of the trial, the Government introduced into evidence the sixteen marijuana cigarettes and the marijuana residue of the tobacco tins. The Government was unable to produce the cans for the reason that the Treasury Agent's six-year-old boy destroyed them during his absence. The defendants, in their opening statement, asserted as their theory of defense a general denial of the allegations of the Government with the added proposition that if narcotics had been found in or about the premises of the "Club 69", its public status stripped from its owners or managers the full responsibility in terms of possession and control of everything contained thereon or therein.

ARGUMENT.

I.

EVIDENCE OF PRIOR SIMILAR ACTS OF THE DEFENDANT WAS
PROPERLY ADMITTED BY THE TRIAL COURT.

This appellee is fully in accord with appellant's statement of the law that evidence of offenses other than those charged in the indictment are inadmissible to prove or tend to prove the truth of any charge contained in the indictment. More formally stated in *Johnson v. United States*, 22 Fed. (2d) 1, Judge Bean of this Court stated:

“The general rule is unquestioned that, when a defendant is put on trial for one offense, evidence of a distinct offense unconnected with that laid in the indictment is not admissible.”

supporting which the Court set forth various authorities, including *Smith v. United States*, cited in appellant's brief, page 3. However, Judge Bean continues to say:

“While this is the general rule, the exceptions are so numerous that it has been said: ‘It is difficult to determine which is the more extensive, the doctrine or the acknowledged exceptions.’ ”

The judge continues in his opinion with the statement “evidence which is relevant is not rendered inadmissible because it proves or tends to prove another and distinct offense”, for which general knowledge he cites numerous authorities. Again: *Simpkins v. United States*, 78 Fed. (2d) 594, at page 598, wherein the Court said:

“This is not to say that in all cases evidence of other crimes and collateral matters are to be excluded because not contended in an indictment, as there are a number of well recognized exceptions to the rule. Thus, where the motive or special intent of the defendant is an element in the crime charged against him, or it otherwise becomes necessary to show his purpose, knowledge or design, evidence of similar transactions are admissible if not too remote in point of time.”

At bar, the appellee's cause before the trial Court was premised in chief upon the evidence of narcotics lawfully seized from the premises of the “Club 69”. The “Club 69” was occupied by the appellant, Raymond Wright, and his wife, Vernestine Wright. (Tr. of R. 143, 144, 156, 157, 168, 184, 185.) As is inherent in cases of this type and as so set forth in the Court's instructions, the Government was obliged to prove that the defendants feloniously and knowingly had possession of and under their control a narcotic drug, to-wit, marijuana. Knowledge, therefore, was a material allegation. Considering now the relatively strong likelihood of inferences raised against circumstantially proved possession and control by owners or managers of a public place, it was indispensable to the Government's case that a showing be made dealing directly with the knowledge of the defendant. It was for this reason, namely, to dispel such a strong inference of accident or non-responsibility solely by reason of owning or managing a public place, particularly in view of the appellant's absence during the seizure, that the Government saw fit to introduce evidence that on oc-

casions immediately prior to the date on which the search warrant was executed and served the appellant, Raymond Wright, had, in, fact, knowingly possessed, used and sold narcotics similar to the type found during the search. In support of appellee's contention of the admissibility of such evidence, reference is made to *Wigmore's Code of Evidence* (3rd Ed.), Volume 2, Section 301, page 193, et seq., setting forth the general principles governing such a proposition, wherein Professor Wigmore states that the "use of evidence of former offenses involves the other general mode of showing knowledge, namely, the use of external circumstances like 'a priori' to have produced knowledge". The following passages in Wigmore cite authorities dating back to 1846, bearing out the rule as he states it. That Courts have consistently recognized the showing of knowledge and intent by other similar acts (or of offenses) to be a well recognized exception of the general rule is amply borne out by the following decisions:

Bonelle v. United States, 53 Fed. (2d) 997:

"Evidence of other similar offenses is competent to show guilty knowledge, notice, or intent."

Breedin v. United States, 73 Fed. (2d) 778:

"* * * It is well settled that, as bearing upon the question of intent, purpose, design, or knowledge, evidence of similar transactions occurring at or about the same time is competent."

Stubbs v. United States, 1 Fed. (2d) 837
(C.C.A. 9th C., rehearing denied):

Syllabus: In prosecution for selling narcotic drugs without having registered and paid

special tax, witness to whom alleged unlawful sale was made was properly permitted to testify to previous sales made by defendant, in order to show that defendant was person required to register.

Casey v. United States, 20 Fed. (2d) 752 (C.C.A. 9th C., rehearing denied):

Syllabus: Testimony relating to acts unconnected with sale of morphine specifically alleged held admissible to show that defendant was person dispensing narcotics and required to register.

In this case, Judge Dietrich said:

“The only ones (assignments) seriously argued cover testimony relating to acts and circumstances which it is contended are unconnected with the alleged sale on December 31st, and relate to offenses not charged; *but all of it directly or indirectly tended to show that on December 31st defendant was dealing in and dispensing narcotics*, and also that defendant was a person required to register; hence, it was relevant.” (Italics ours.)

Caldwell v. United States, 78 Fed. (2d) 282:

Syllabus: Evidence of similar transactions is admissible under certain circumstances as bearing on question of intent, purpose, design, or knowledge.

Sargent v. United States, 35 Fed. (2d) 344 (C.C.A. 9th C.):

Syllabus: In prosecution of physician for selling morphine sulphate, evidence of previous sales was admissible.

In this case, the Court cites:

Thompson v. United States, 288 Fed. 196;

William v. United States, 294 Fed. 682;

Casey v. United States, *supra*.

McFarland v. United States, 65 Fed. (2d) 74
(C.C.A. 9th C.):

Syllabus: In prosecution for unlawful purchase of morphine, bindles of narcotics purchased on several occasions prior to defendant's arrest held admissible.

Innumerable additional authorities could be listed supporting the admissibility of such evidence. Further, there seems no room to doubt that Courts have generally applied the recognized exceptions of the rule to all varieties of cases notable among which are possession violations, fraud, and false pretense cases. In view of this wealth of support, appellee contends that the trial judge did not err in admitting evidence in the case at bar of other acts of the defendant showing and tending to show knowledge and design, even though the acts evidenced thereby may incidentally have been crimes. Counsel's argument that the names of the purchasers were not made known has little merit as it could hardly be said that a failure of identification of all the parties to a witnessed transaction strips entirely the relevancy of such witnesses' statement concerning the substance of the transaction.

The only remaining question concerning this assignment, as gleaned from appellant's brief, deals with the order of proof consistent with good court prac-

tices, suggested by counsel's citing in his points and authorities, page 2, a portion of the case *Smith v. United States*, 10 Fed. (2d) 787-788, setting forth a rule that on cross-examination of accused the defendant's denial of matters entirely collateral with the matters with which he was charged bound the prosecution, and it was error to allow the prosecution to offer rebuttal evidence that the defendant had been so engaged. In the first place, in the case at bar the record fails to show wherein the prosecution offered any rebuttal evidence of the appellant's engagement in any matter, which statement of failure is strengthened by the absence of any reference to any part of the record supporting appellant's position. The rule seems well stated concerning the order of proof in *Wigmore's* treatise, Section 307, Volume 2, page 207, wherein Professor Wigmore states that "Intent in virtually all offenses is material and is therefore a part of the case to be proved in chief; and that unless the precise defense be disclosed in advance the prosecution may in fairness assume that intent may come into issue." Closely analogous, of course, to intent is the precise defense be disclosed in advance the prosecution is a part of the case to be proved in chief. It seems to the appellee that appellant's citations would more appropriately apply to the situation wherein the prosecution offered rebuttal evidence to matters testified to by the defendant with the effect of impeaching his credibility and otherwise attacking his character which would not, premised alone on such propositions, be at issue and, accordingly, not subject to

attack. Appellee, therefore, respectfully urges that no meritorious assignment is raised on this point.

II.

THE TRIAL COURT DID NOT IMPROPERLY REFUSE TO LIMIT BY INSTRUCTION THE EVIDENCE OF PRIOR SIMILAR ACTS TO THE PURPOSES FOR WHICH SUCH WAS INTRODUCED.

Concerning next appellant's assignment of error in what he claims was the failure in duty of the Court to instruct the jury and limit the evidence to the purpose for which it was intended, he has referenced his brief with Transcript of Record, pages 245, 246 and 247, wherein the court apprised counsel for the appellant that the instruction about to be given would limit the finding of fact of guilt to a day certain named in the Indictment, to-wit, the 4th day of August, and in addition to which the Court invited appellant to present any instruction in mind for consideration. Referring now to the instruction given by the Court (T. of R. 249, Instruction I-a), wherein the following language appears:

“From the above the jury will note that the possession of a narcotic drug mentioned in the indictment must be known to a defendant at the time and place mentioned in said indictment in order that he or she may be guilty of the crime charged.”

Appellee can conceive of no stronger language instructing the jury as to the time element than the di-

rect statement made by the Court in its instructions. Further, appellee contends that as a result of considerable search in the authorities dealing with this subject, very little discussion by the Courts was found indicating a practice of, let alone a mandate for, specific instructions exhaustively covering the purpose for which the admission of such evidence may be considered. The general theory of the law seems well established that under the rule of multiple admissibility, evidence which is relevant and material as tending to prove the issues before a court is admissible unless rejectable for specific reasons. The propositions of theory upon which the rules of evidence are necessarily premised are generally inherently incapable of being expressed in terms understandable by jurors for which reason the law has left the question of admissibility or non-admissibility to the discretion of the trial Court and the higher Courts for review, quite evidently not being content to rely upon a juror sifting the wheat from the chaff by a yardstick of explanation given to him in terms often beyond his experience. Certainly, in the case at bar the trial Court's simple, definite and direct instruction as to time and place seem adequate, both as to authority precedent and legal theory, and is, therefore, worthy of honor.

For authority supporting appellee's position in this assignment attention is respectfully directed to the following:

Federal Rules of Criminal Procedure, Rule No. 30, U.S.C.A., Title 18, page 22, entitled "Instructions":

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. *No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * **" (Italics ours.)

23 *Corpus Juris Secundum*, page 944:

"As a general rule, where the court has instructed generally as to the issues, if accused desires a particular instruction or an instruction upon a particular phase of the case, he should submit it with a proper request that it be given, otherwise a failure to give it is not error, * * *"

citing numerous authorities in support of such rule.

Referring again to appellant's reference in his brief (page 2) wherein he cites Transcript of Record, pages 245, 246 and 247, in support of his statement that the Court refused to instruct the jury limiting the evidence to the purpose for which it was intro-

duced, appellee cites a portion of the language of the transcript appearing on those pages, bearing on this point:

“Mr. Hurley. Even in the cases where other crimes are admissible, it is only admissible for absolutely one purpose and—— (Interrupted).

The Court. *If you have an instruction to present, I will consider it.*

Mr. Hurley. *I haven't any* and I haven't had time to prepare any. I didn't know—this kind of came up suddenly.

The Court. Was there any other point that you wanted to know about?

Mr. Hurley. And they can convict on that other evidence?

The Court. It simply tells them that there must be—they must find that on the 4th day of August they had marijuana out there; on the 4th; not any other day.

Mr. Hurley. It is not any time before the—— (Interrupted).

The Court. No, no, just the one date.

Mr. Hurley. Could I have about a 15-minute recess before I argue?

The Court. I will give you 10 minutes.” (Italics ours.)

The only possible inference suggesting any unfairness would be Mr. Hurley's statement “* * * and I haven't had time to prepare any * * *” which lacks merit for the two reasons that the objectionable evidence complained of was offered in its entirety during the Government's case in chief and certainly appellant's counsel had ample time, having

been put on notice before he proceeded with his case and considerably before the jury would be charged, to present any instruction he desired; and there is no showing in the above set forth language that appellant requested any time within which to prepare an instruction, assuming that he had a prayer of an excuse for not having done so before the time the jury would normally be charged.

III.

NO COMPETENT OR RELEVANT EVIDENCE WAS PROPERLY OFFERED BY THE APPELLANT AND REFUSED ADMISSION BY THE TRIAL COURT.

Appellee agrees that the general law and supporting decisions consistently show that as concerns witnesses, such may properly be questioned concerning matters tending to show bias and prejudice towards any of the parties. In qualification of this general rule, it seems equally well established that the trial judge may properly limit such evidence to the fact itself and may exclude excursions into details.

State v. McCann, 47 Pac. 443:

“The remaining questions were directed to occurrences between the deceased and the defendants, relating to altercations over road matters, and the part that the witness took therein. The objection was properly sustained to these questions. The witness had already testified he was a friend of the deceased, and the court informed counsel for the defendants that he might interro-

gate the witness as to what feeling he had, friendly or unfriendly, toward the defendants, and *this was all the defendants were entitled to show.*" (Italics ours.)

Also, *State v. Constantine*, 93 Pac. 317:

"The fact that such civil action had been begun was material on the question of the credibility of the witness as it tended to show he had more than the usual interest in the result of the criminal prosecution against the appellant, *but all that was material was proven when the fact itself was admitted by the witness.*" (Italics ours.)

Certainly the record shows that the trial Court allowed the appellant to far exceed the bounds normally permitted by Courts in showing the bias or prejudice, if any existed, of the prosecuting witness. (Tr. of R. 170, 171, 172, 179, 180, 181, 200, 201.) As the fact itself was many times brought out to the jury, appellant's only reasonable complaint could be that an exhaustive discussion, including proof of the matters which he claims relevant to show motive and bias, could be offered for impeachment purposes and it is well settled that such an offer must contain a proper foundation, which appellant failed to offer, probably because of impossibility, there having been no indictment, let alone conviction, for impeachment purposes. Accordingly, the trial court was justified in placing some limitation on appellant's pursuit of this subject. For a more detailed treatment of this proposition appellee respectfully directs attention to the Government's brief filed with this Court as a

companion case involving the same appellant and the same assignment, No. 12,868.

CONCLUSION.

For the reasons aforementioned, appellee respectfully prays that the jury verdict and sentence in the case at bar not be disturbed.

Dated, August 6, 1951.

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United States Attorney,

HUBERT A. GILBERT,

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Fourth Judicial Division, Territory of Alaska,

Attorneys for Appellee.

Service by receipt of copy of the foregoing brief of appellee is hereby acknowledged, this 27th day of July, 1951.

(Signed) *Julien A. Hurley,*
Attorney for Appellant.

No. 12,870

IN THE
United States Court of Appeals
For the Ninth Circuit

SIDNEY L. WATERS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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FILED

APR 30 1951

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No. 12,870

IN THE

**United States Court of Appeals
For the Ninth Circuit**

SIDNEY L. WATERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from a final decree entered by the District Court on August 30, 1950, in favor of appellee, United States of America, and against respondent, a seaman who filed a Libel in Admiralty for maintenance under the provisions of 28 U.S.C.A. 837 (now Sec. 1916)¹ and under the Public Vessels Act, 46 U.S.C.A. 781.

The said libel alleged that libelant signed shipping articles whereby he engaged to serve as chief engineer on the American Steamship "Arthur A. Penn," a vessel owned and operated by the United States, for a voyage to the South Pacific and return, and that dur-

¹Enables seamen to prosecute suits without prepayment of costs.

ing the course of said voyage he became ill and at the termination thereof, on or about March 11, 1945, he was compelled to leave the vessel for hospital treatment for pulmonary tuberculosis. He further alleged that he was entitled to maintenance at a rate of \$7 per day from July 6, 1949 to November 26, 1949, in the total sum of \$896.

Appellee answered the said libel, admitting ownership of said vessel but denying that appellant suffered disability as alleged or that it was indebted to appellant in the sum of \$896, or in any other sum.

Appellant subsequently filed an amendment to said libel, alleging that on or about April 24, 1944, while employed as chief engineer on the Steamship "Benjamin Bonneville," owned and operated by the United States, he became ill and was compelled to leave the said vessel because of said illness, and that he remained ashore resting until December 13, 1944, when he signed articles on the SS "Arthur A. Penn" as previously alleged. It was further alleged that on or about November 13, 1945, appellant accepted a settlement in consideration of the payment of \$1,000 and executed a release of all claims and demands, releasing appellee, the said vessels, and general agents from liability. It was also alleged that the said consideration was inadequate and that the settlement was unfair and entered into by appellant without comprehension or understanding of his rights, and that he had been misled. It was further alleged that the settlement "was not full, fair, and adequate" and appellant asked

that "the release be declared invalid and that it be set aside."

An answer was duly filed by appellee to the said amendment to the libel, alleging that appellant "executed a full release of all claims and demands which he then had or might thereafter have against the United States of America for any illness arising aboard the vessels SS "Benjamin Bonneville" and SS "Arthur A. Penn," and that appellant "received the sum of \$1,000 in consideration for signing the said release and that said consideration was adequate and fair and entered into by libelant with a full understanding of all his rights." A copy of the release was attached to the said answer.

The District Court after hearing the testimony of the witnesses, including that of two medical witnesses, found and decreed that appellant's "illness was not caused by any unseaworthiness of either of the said vessels or by any negligence" on the part of appellee. (Ap. 133.) The Court further found and decreed that the amount of \$1,000 paid by appellee in settlement of appellant's claim "was adequate and fair consideration" and that "the said release is and was of binding force and effect." (Ap. 133.) It was further found and decreed by the Court that appellant was confined for treatment for pulmonary tuberculosis to the United States Marine and Public Health Service hospitals from March 13, 1945 to July 6, 1949, with the exception of certain short periods when he was an outpatient, and that otherwise

appellant was under outpatient care from July 6, 1949 to approximately May 8, 1950, on which latter date he was not in need of any further treatment for his tubercular condition. The Court further found and decreed that it was not true that appellee was liable for maintenance at the rate of \$7 per day in the total sum of \$896, as alleged by appellant, or for any other sum. (Ap. 133.) The Court decreed that appellant was not entitled to recover anything from appellee, and that the libel be dismissed. (Ap. 135.)

STATEMENT OF FACTS.

Inasmuch as it appears from the appellant's brief that he has not stated fully the material facts upon which the District Court's decree was based, it is deemed necessary to submit the following:

Appellant testified that other than reporting to a Public Health Service doctor following the termination of his voyage on the SS "Benjamin Bonnevile" in October, 1944, he did not go to the Marine Hospital or seek other medical attention, that he was simply "feeling pretty bum." (Ap. 39.) He then shipped out again on the SS "Arthur A. Penn" on the 15th of December, 1944 (Ap. 27), and he left the "Arthur A. Penn" at the termination of the voyage on or about the 12th or 13th of March, 1945. (Ap. 28.) During the trip on the "Arthur A. Penn" there were two occasions on which appellant "had to work all night." (Ap. 29.) He remained in the Marine Hospital from

March until June, when he showed slight improvement, and then went home, but came down with a cold and returned to the Hospital again. (Ap. 30.) Appellant himself suggested that he be allowed to go to Los Angeles where he thought it would be warmer, and the doctor at the Marine Hospital gave him permission to do so. (Ap. 31.) He went to the office of John H. Black, attorney for the vessel's representatives, and talked to Mr. R. L. Frick, an attorney in Mr. Black's office, concerning a proposed settlement. He told Mr. Frick "I thought \$5,000 would be a fair settlement." (Ap. 33.) Mr. Frick then took the matter up with Mr. Black, and advised him that the case could be settled for \$1,000. (Ap. 33.) Appellant testified further that Mr. Frick told him that in the absence of a settlement maintenance would be paid for a reasonable length of time.

Mr. Frick testified that appellant first came into his office on October 25, 1949, for the purpose of discussing his claim, at which time appellant stated the facts of his case, which statement after being transcribed, was read and signed before a notary public by appellant as being true and correct. (Ap. 64.) (Respondent's Exhibit A—Ap. 55.) Mr. Frick testified that he questioned appellant about his employment on the vessels, and as set forth in said statement, appellant declared "I have no complaint to make about either the living conditions on either the SS 'Benjamin Bonneville' or the SS 'Arthur A. Penn.' They were both standard liberty vessels and I occupied

quarters on each of them by myself," and further that "there was never any complaint made against the vessel in any way." (Ap. 65.) As to whether this included working conditions also Mr. Frick testified as follows:

"The Court. Q. That includes working conditions?

A. Yes, your Honor, very definitely as to the working conditions." (Ap. 65.)

Following this discussion, Mr. Frick suggested that appellant get a medical abstract from the Marine Hospital. The medical abstract was obtained (Ap. 68, respondent's Exhibit "E") and given to Mr. Frick on November 1, 1949. The contents of the abstract were discussed and shown to appellant, and Mr. Frick advised him that his claim was one based on maintenance only and that since he was interested in a lump sum settlement he would discuss the matter. Appellant asked for \$5,000 in settlement of the claim, and Mr. Frick, after discussing it with Mr. Black, offered \$1,000. (Ap. 72.) Appellant indicated he desired to see a lawyer, and Mr. Frick informed him that if he wanted to consult a lawyer he would be glad to discuss the matter with his lawyer. Appellant returned on November 13, 1949 and Mr. Frick again explained to him that he was entitled to receive his maintenance up to the date of the discussion and to continue to receive maintenance week by week, that it was up to appellant whether he desired to take an aggregate sum in settlement of his future period of disability or to be paid on a week-to-week basis. (Ap.

73.) Mr. Frick discussed with appellant the maintenance rate, which at that time was \$4 per day, and figured that there was approximately ten weeks accrued from August 31, 1949, when appellant was discharged from the hospital, until November 11, 1949, or a total of approximately \$280. (Ap. 74.) Appellant agreed to settle his claim and thereupon executed the release and was paid \$1,000.

Mr. Frick further testified that it is customary in the handling of these seamen's claims for some of them to seek and obtain lump sum payments rather than to go along on a week-to-week basis (Ap. 75), and that he very definitely told appellant that he could either take it by the week or obtain a lump sum payment. (Ap. 76.) He told appellant that according to the Marine Hospital report his prognosis was uncertain and that he did not know when appellant would be recovered from his illness, and that if the latter had any misgivings on the matter to wait and see and take his maintenance by the week, that otherwise he could settle on a lump sum basis. (Ap. 81, 82.)

At the time the discussions took place between appellant and Mr. Frick, the latter did not have before him any X-ray reports or X-ray findings other than the said abstract from the Marine Hospital. (Ap. 92.)

Dr. Harold G. Trimble, a recognized, duly licensed physician, specializing in chest and tubercular cases, testified that he examined appellant on May 8, 1950 and diagnosed the condition as pulmonary tuberculosis which had run the usual course, and at the time

of Dr. Trimble's examination his tests disclosed that he had no tubercule bacilli. (Ap. 97.) At the time of the doctor's examination he felt that the man was able to follow any occupation which did not require heavy physical work, but that because of his age it was inadvisable to return to sea. The doctor felt that no further medical treatment was necessary (Ap. 99), and that it was better for the man to be working. (Ap. 100.)

SUMMARY OF ARGUMENT.

Appellant's claim that the trial Court erred in finding that his illness was not caused by any unseaworthiness of appellee's vessels, or its negligence, is without merit and without any support in the record. The evidence clearly shows that there was no alleged unseaworthiness or negligence. The further claim that the release was invalid because of alleged inadequate consideration or because it was not fairly arrived at, is likewise unsupported by and of the evidence, including appellant's own testimony.

The findings of the District Court, based entirely upon oral testimony given by witnesses in open Court, is entitled to great weight and should not be disturbed. The District Court chose to believe the testimony, of Dr. Trimble, against that of Dr. Wolfman, and to consider the testimony of Mr. Frick as being truthful as against testimony given by appellant. But even in the case of testimony given by the appellant himself, there is no showing that he was in any manner overreached

or that he did not fully comprehend that he was accepting a lump sum settlement of his claim in preference to weekly payments.

ARGUMENT.

I.

THE FINDINGS OF THE TRIAL COURT ARE ENTITLED TO VERY GREAT WEIGHT AND SHOULD BE AFFIRMED.

This is an admiralty case and, therefore, the rule regarding the weight of the trial Court's findings of fact is admittedly somewhat different than in an appeal at law. The Court of Appeals has the power to try such cases *de novo*. However, this Court in the case of *Tawada v. United States*, 162 F. (2d) 615, declared as follows on this precise point:

“(1) In an appeal in admiralty, where a substantial part of the evidence was heard in open court, the ‘correct rule’ is that the findings of the trial Court ‘are accompanied with a rebuttable presumption of correctness’. *Thomas v. Pacific S.S. Lines, Ltd.*, 9 Cir., 84 F. (2d) 506, 507, 508; *the Pennsylvanian*, 9 Cir., 149 F. (2d) 478, 481. And ‘where all of the evidence is heard by the trial judge and the question is one of credibility of witnesses on conflicting testimony, the presumption (that the findings of the District Court are correct) has very great weight.’ ”

This Court also stated the rule in *Stetson v. United States*, 1946 A.M.C. 900, 155 Fed. (2d) 359 (C.C.A.

9th) and in *Bornhurst v. United States*, 1948 A.M.C. 53 (C.C.A. 9th), as follows:

“The findings are supported by substantial evidence, are not clearly erroneous, and hence should not be disturbed.”

See also *City of New York v. National Bulk Carriers, Inc.*, 138 Fed. (2d) 826, where the Court said:

“It appears to be impossible to convince the bar that we will disturb findings of fact as seldom in admiralty causes, as in any other. Whether there lingers a notion—never in fact justified—that because an appeal in the admiralty is a new trial, the scope of our review is broader, we cannot know; but over and over again appeals are taken without the least chance of success except by over-setting findings of fact upon disputed evidence. In order to meet this persistence we may in the end find ourselves forced to invoke the penalty provided in Rule 28 (2) of this Court.”

To the same effect are many other cases, including:

“*Heranger*”, 101 Fed. (2d) 953 (9CCA);
City of Cleveland v. McIver, 109 Fed. (2d) 69;
Commercial Molasses Corp. v. New York Tank B. Corp., 114 Fed. (2d) 248;
The S.C.L. No. 9, 114 Fed. (2d) 964.

The facts in relation to every material issue in the matter at bar were decided by the District Court in favor of appellee and against appellant. A trial *de novo* is therefore not available to appellant.

It is not believed that this Court should or will try this case *de novo*. The rule appears to be well settled that the trial Court is in a better position to judge the credibility of witnesses and to give weight to the evidence when, as here, all the testimony is adduced from witnesses who have testified personally in Court.

II.

THE EVIDENCE FULLY SUPPORTS THE DISTRICT COURT'S FINDING THAT APPELLANT'S ILLNESS WAS NOT CAUSED BY APPELLEE'S NEGLIGENCE OR UNSEAWORTHINESS OF ITS VESSELS.

On the whole, the testimony of appellant himself fell far short of establishing unseaworthiness of the vessels or negligence of appellee. As indicated in the record, the voyages were undertaken during wartime conditions when all merchant seamen were necessarily required to put in somewhat more hours than under normal conditions, and where the personnel included some whose experience was not as great as seamen regularly plying their trade. This situation, of which the Court can take due judicial notice, by no means was shown by any evidence in the record to have amounted to unseaworthiness of either of the vessels, or negligence on the part of appellee, nor does the record show that appellant's illness was caused by any negligence or unseaworthiness.

It is contended that because appellant sailed on the "Arthur A. Penn" before it was known that an X-ray taken earlier disclosed tuberculosis, negligence is

established on the part of appellee. Such contention is immaterial to the issues properly before this Court. In any event, there is no competent evidence showing that because of such fact appellant's condition was, with reasonable certainty or probability, caused or aggravated by that voyage. The only testimony on this phase is that of Doctor Wolfman, who merely stated that such circumstances as described by appellant, but not necessarily believed by the Court, "would have a *tendency* to promote the development of tuberculosis." (Emphasis supplied.) (Ap. 47.) Doctor Wolfman was then asked the following question by appellant's counsel, and gave the following answer:

"Q. Now assuming, as stated, about a month after the conclusion of the voyage the X-rays then revealed a moderately advanced tuberculosis, *is it possible* medically, or probable, that tuberculosis could reach that moderately advanced state under those conditions within the period described of some seven or eight months?" (Emphasis supplied.)

"A. It *could* be very easily. The term described only the physical extent of the disease in the lung and does not imply the length of time it has taken to develop." (Emphasis supplied.) (Ap. 47.)

Counsel for appellant then asked the doctor whether, *assuming* that appellant "was overworked * * * that delay in treatment would be—and also the condition encountered—would be harmful or not?" and the doctor answered affirmatively. (Ap. 47, 48.)

Here, again, the District Judge was well within his province in finding from the evidence that appellant was not "overworked" to the extent claimed. This testimony, in any event, based upon speculative questions not supported by the evidence, was undoubtedly treated by the District Court as being of little or no value. It therefore appears abundantly clear that the District Court was justified in finding that there was no negligence or unseaworthiness, and that in any event any such alleged negligence or unseaworthiness was not the proximate cause of appellant's illness.

Finally, we wish to point out that it was not shown by any evidence that whoever took or reviewed the X-rays was an employee of the vessel or that any alleged negligence of such person was chargeable to the vessel. Even if the doctor who took the X-rays were an employee of one department of the Government, his alleged acts or omissions could not bind another department. See *Burke v. United States*, 67 F. Supp. 827 at 830, where the Court pointed out: "Notice to one of these officers of some fact relating to a branch with which he was not connected is not and should not be notice to the department, binding on it in future transactions." To the same effect see *Jones v. United States*, 106 Fed. (2d) 888 at 891.

In this action, which is a libel for maintenance only, appellant's discussion relating to alleged negligence or unseaworthiness is immaterial and outside the issues involved. We reiterate, however, that appellant has not established by any acceptable evidence that his

illness was caused by any unseaworthiness of either vessel or by any negligence of appellee. The lower Court's finding in this respect is fully supported by the evidence.

III.

THE RELEASE WAS FAIRLY OBTAINED, IS BASED ON ADEQUATE CONSIDERATION, AND IS THEREFORE VALID AND BINDING.

Appellant argues that inasmuch as the release for \$1,000 was based upon maintenance that there was a failure of consideration because it also included a release of all claims. (Appellant's Brief, page 9.)

In the first place, there is evidence before the Court that before the release was taken appellant himself admitted to appellee's representative, Mr. Frick, that his illness was not caused by either the living quarters or the working conditions on either of the vessels here involved (Ap. 65), and as found by the lower Court, the evidence clearly indicated that appellant's illness was not caused by any unseaworthiness of either of the vessels or negligence of appellee.

At the time the settlement was entered into appellant would have been entitled to maintenance in the sum of approximately \$280. His future disability was uncertain, and if he had chosen to accept settlement on a week-to-week basis he would have received it in that manner. He chose instead to obtain a \$1,000 lump sum settlement. In other words, he received in

addition to what he was legally entitled at that time, \$720, which, as indicated by the release, was in settlement of maintenance and all other claims, including damages. Since it is clear that there was no basis then, nor as developed by the evidence at the time of trial, for a recovery of damages, it cannot be said, even on the ground urged, that the consideration for the release was inadequate. The District Court in seeing and hearing the witnesses on this issue was satisfied that the consideration was fair and adequate, and further that appellant was not misled in any manner in executing the release. Indeed, appellant testified at the trial as follows:

“There was no agreement reached on the thousand dollar settlement until sometime after. When he offered me that thousand dollars, I told him that I wanted to take time and study it over and possibly get some legal advice on it before I signed it, and he said, ‘O.K.’ He said, ‘If you have got a lawyer, bring him up here,’ he said, ‘and we will discuss it.’” (Ap. 60.)

How there could possibly be any basis for the claim that appellant was overreached or misled, it is difficult to comprehend. As shown by Mr. Frick’s testimony, he carefully and clearly explained appellant’s rights to him before the release was taken:

“Yes, I explained to him very carefully to the best of my ability that he would be entitled to maintenance for a reasonable time, if a release were not taken, that time being very uncertain, the cases being somewhat conflicting on what a

reasonable time is; that in no event would we be obligated to pay maintenance after he had reached a maximum medical benefit or stationary condition. That would be my understanding of the law.”

Appellant has cited in his brief the case of *Bonici v. Standard Oil Company*, 103 F. (2d) 437 (C.A., 2d Cir.), which he seems to regard as being in support of his position. This case involved a seaman who executed a release of all claims, in the sum of \$89.40. The seaman had suffered an injury to his shoulder, and had been hospitalized for about three weeks. The release, “a general release of all claims,” was taken about a week after he was released from the hospital. It developed that the seaman suffered further disability from his shoulder and was disabled for nearly four months after the release was taken. The pertinent portions of the Court’s opinion are as follows:

“As the case was ultimately presented to the court, this libel was limited to a claim for Bonici’s maintenance and cure between March 16 and July 8, 1938. Originally there was also a claim for damages for injuries sustained on the ground that the accident was caused by respondent’s negligence. But this was withdrawn at the trial, counsel stating that he thought the release covered all claims based on negligence. Further, the court made a specific finding that respondent was not negligent and the vessel was not shown to be unseaworthy. The issue presented was as to the binding force of the release. The court held that the libelant could not give away, or release

away, his right to maintenance and cure, and therefore made him an award at the rate of \$2 per day for the period, amounting in all to \$228. This appeal challenges the ruling as to the release.

“* * * Libelant is a person of some education, able to read and write, and the court held, as indeed his counsel conceded, that he knew he was signing a general release. He testified, however, that he did so because the doctor for respondent told him that there was nothing the matter with his arm and that he would be ready to work in five or ten days. * * *

“The court held the release to be ineffective as against the seaman’s claim for maintenance and cure, on the authority of *Calmar Steamship Corp. v. Taylor*, 303 U.S. 525, 58 S.Ct. 651, 654, 82 L. Ed. 993. But we feel that this is an unwarranted interpretation of the *Calmar* case, which does not go so far. It does hold for the first time in the Supreme Court, what had already been ruled in the lower federal courts, that the shipowner’s obligation to his seaman for maintenance and cure, or care, might outlast the voyage when the seaman had suffered illness during his service and continue for ‘a fair time’ ‘in which to effect such improvement in the seaman’s condition as reasonably may be expected to result from nursing, care, and medical treatment.’ And it held (approving *The Mars*, 3 Cir., 149 F. 729, 730, and *Wilson v. Manhattan Canning Co.*, D.C.W.D. Wash., 205 F. 996, 997) that the allowance might include small amounts to cover future mainte-

nance and cure of a kind and for a period which can be definitely ascertained.

“(1) We think the rule to be applied is that which apparently prevails generally as to seamen’s releases in admiralty, namely, that such releases are not wholly invalid, but are jealously scrutinized to see that these ‘wards of the admiralty’ have not been overreached. The tender consideration of admiralty for these ‘favorites’ of the court who are ‘a class of persons remarkable for their rashness, thoughtlessness, and improvidence’ (Story, J., in *Brown v. Lull*, C.C., 4 Fed. Cas. 407, 409, No. 2018) has been emphasized once again in the recent case of *Socony Vacuum Oil Co. v. Smith*, 305 U.S. 424, 59 S.Ct. 262, 83 L. Ed., affirming 2 Cir., 96 F. 2d 98, in holding the common law doctrine of assumption of risk not a defense to a seaman’s action for personal injury. See also *Calmar Steamship Corp. v. Taylor*, *supra*; *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 377, 53 S.Ct. 173, 77 L. Ed. 368; *The Osceola*, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760. A classic statement of the rule appears in Mr. Justice Story’s opinion in *Harden v. Gordon*, C.C., 11 Fed. Cas. 480, No. 6047, at page 485, where he states that, while seamen are ‘not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees.’ And there he held invalid a stipulation limiting the shipowner’s responsibility

for medicine and medical care to that furnished by the medicine chest on board ship.

“(2), 3) Hence, while (‘one who claims that a seaman has signed away his rights to what in law is due him must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman’ (Harmon v. United States, 5 Cir., 59 F. 2d 372, at page 373), *nevertheless a release fairly entered into and fairly safeguarding the rights of the seaman should be sustained. Any other result would be no kindness to the seaman, for it would make all settlements dangerous from the employer’s standpoint and thus tend to force the seaman more regularly into the courts of admiralty. Even if a seaman is the court’s ward, the court cannot be always at hand to watch over him, for it can only move ponderously in a formal lawsuit. Fair settlements are in the interest of the men, as well as of the employers.*” (Emphasis supplied.)

“(4) *We think, therefore, that the trial court should not have held a seaman’s release as always inoperative, but should have considered this release from the standpoint of the fairness of the conditions under which it was secured and of the settlement which it constituted.* In view, however, of the evidence in the record bearing upon the taking of the release and of the small award made, we feel that we should dispose of the matter without requiring a new trial. The evidence is clear, as the doctor for the respondent showed in his report, that the injury was considered much less serious at the time the release was given than it eventually turned out to be. The

release was signed because of the advice given by the respondent's doctor. As it turned out, nearly four months' additional care was needed before the libelant could go back to work, during which time he was in dire need of ordinary maintenance. A release induced by the diagnosis given by the employer's doctor should not prevent the award of additional maintenance when the diagnosis is shown to have been erroneous, even though it may have been quite honestly made." (Emphasis supplied.)

The Court of Appeals, in affirming the lower Court, allowed maintenance for the additional period, and commented that the money he had received at the time of giving the release "was somewhat in excess of maintenance then accrued, but the court was justified in holding that the additional amount was given to secure a release covering, among other things, the claim of damages for negligence."

It is plain from the language of the *Bonici* case that "*a release fairly entered into and fairly safeguarding the rights of the seaman should be sustained,*" and that any other result would be "*no kindness to the seaman, for it would make all settlements dangerous from the employer's standpoint and thus tend to force the seamen more regularly into the courts of admiralty.*" (103 Fed. (2d) 437, at 439.)

In *Bonici's* case, he was induced to sign a release for a small sum of money, on the basis of erroneous advice given by the shipowner's doctor. There is no

possible circumstance in the case at bar that could be compared with the situation there. As is abundantly clear from the evidence, appellant carefully considered the question of entering into a settlement, even to the extent of delaying the settlement for the purpose of consulting a lawyer. Mr. Frick, with whom he dealt, invited him to do so, and to bring his lawyer in for a discussion if he desired. Following this, appellant decided to settle his case for a substantial amount, namely, \$1,000. This, as pointed out, was \$720 more than the amount of maintenance accrued at the time that the release was taken. This was and is good and sufficient consideration for a release of all claims.

It would seem clear from the evidence that appellee has met the burden of sustaining the release.

CONCLUSION.

Appellant in this case was given a full and fair trial in the lower Court, where the District Judge had the opportunity to, and did, hear all of the witnesses testify. The evidence fully supports the lower Court's finding that appellant's illness was not caused by any unseaworthiness of appellee's vessels, or by the latter's negligence. In any event, the Court properly dismissed appellant's libel for maintenance in view of the validity of the release which was fairly entered into by appellant, and for which he received a good and adequate consideration. The trial Court's

findings and decree, being based (except for documentary evidence) entirely upon the oral testimony of witnesses who appeared and testified personally in Court, should be affirmed.

Dated, San Francisco, California,
April 27, 1951.

FRANK J. HENNESSY,
United States Attorney,
Proctor for United States of America.

JOHN H. BLACK,
EDWARD R. KAY,
Of Counsel for United States of America.

No. 12872

United States
Court of Appeals
for the Ninth Circuit.

GEORGE VAARA, ANTHONY ZORICH,
RALPH J. RIVERS, as the Employment Se-
curity Commission of Alaska and R. E. Sheldon,
Director and Chief Executive Thereof,
Appellants,

vs.

NEW ENGLAND FISH COMPANY, a Corpora-
tion, and WARDS COVE PACKING COM-
PANY, a Corporation, for Themselves and All
Others Similarly Situated,
Appellees.

Transcript of Record

Appeal from the District Court
for the Territory of Alaska,
Division Number One.

FILED

APR 20 1952

WILLIAM H. O'BRIEN,

CLERK

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GEORGE VAARA, ANTHONY ZORICH,
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In the District Court for the District of Alaska,
Division Number One at Juneau
Civil Cause No. 6356-A

NEW ENGLAND FISH COMPANY, a Corporation,
and WARDS COVE PACKING COMPANY, a Corporation,
for Themselves and All
Others Similarly Situated,

Plaintiffs.

vs.

GEORGE VAARA, ANTHONY ZORICH,
RALPH J. RIVERS, as the Employment Security
Commission of Alaska, and R. E.
SHELDON, Director and Chief Executive
Thereof,

Defendants.

COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

For cause of action against defendants, plaintiffs
complain, and allege as follows:

I.

That plaintiff New England Fish Company is a corporation organized and existing under the laws of the State of Maine, and authorized to do business in Alaska, and it was so authorized at all times mentioned herein, and it is duly qualified as a corporation doing business in Alaska, and it has filed its annual reports and paid all corporation license fees required to do business in the Territory; and

that plaintiff Wards Cove Packing Company is a corporation organized and existing under the laws of Alaska, and authorized to do business therein, and it has filed the annual reports required by law and paid all corporation license fees due the Territory.

II.

That plaintiffs are members of an association known as the Alaska Salmon Industry, Inc., and they bring this action on their own behalf and on behalf of all other members of the Alaska Salmon Industry, Inc., which itself is a corporation duly organized and composed of member corporations, who are all contributors to the Alaska Unemployment Compensation Fund hereinafter mentioned, and on behalf of all others similarly situated.

III.

That plaintiff New England Fish Company is now and has, for many years, been engaged in Alaska in the business of catching, purchasing, canning, freezing and shipping fish, including salmon and halibut in Alaska, and it has an annual payroll in Alaska of Approximately \$842,501.02, and it is subject to the provisions of Chapter 4, Session Laws of the Extraordinary Session of the Alaska Legislature of 1937, as amended by Chapters 1 and 51, Session Laws of Alaska, 1939, and Chapter 40, laws of 1941, Chapters 8, 20 and 50, laws of 1945, Chapter 32, laws of 1946, Chapter 74, laws of 1947, and Chapter 112, laws of 1949 (Sections 55-5-1 to 55-5-20, inclusive, ACLA 1949), known and desig-

nated as "Alaska Unemployment Compensation Law"; and that plaintiff Wards Cove Packing Company is now and for many years has been engaged in the business of catching, purchasing, canning and shipping fish and fish products in Alaska, and it has an annual payroll of approximately \$192,598.82, and it is subject to the provisions of all the above-mentioned laws of the Territory.

IV.

That the statutes above mentioned are enforced and their provisions are required to be administered by a commission which is referred to and designated as "Unemployment Compensation Commission of Alaska," but the name of the Commission was changed by the provisions of Chapter 53, Session Laws of Alaska, 1949, to "Employment Security Commission of Alaska." That the defendants George Vaara, Anthony Zorich and Ralph J. Rivers constitute the present Employment Security Commission of Alaska, and they are the duly appointed and acting members thereof; and the defendant, R. E. Sheldon, is the director and chief executive of the Commission.

V.

That plaintiffs have made payments to the Alaska Unemployment Compensation fund as required by the statutes hereinabove mentioned since the date of the passage of Chapter 4, Laws of the Extraordinary Session of the Alaska Legislature, 1937, and they have received certain experience rating credits against their required payments, from

July 1, 1947, until June 30, 1950, as provided by Chapter 74, Session Laws of Alaska, 1947 (Sec. 51-5-5 ACLA 1949); that during the period from July 1, 1949, to July 1, 1950, the total amount of \$5,101.72 was paid in cash by New England Fish Company and \$17,645.82 was applied against credits which had been assigned to plaintiff New England Fish Company in accordance with the terms of the statute; and that during the year 1949, the total amount of contributions paid by the Wards Cove Packing Company in cash was \$886.89 and the total amount of credits assigned and used by it was \$4,313.28.

VI.

That Section 51-5-5 ACLA, 1949, as amended by Chapter 112, Session Laws of 1949, requires plaintiffs, and all other employers in Alaska, to pay into the Alaska Unemployment Compensation fund 2.7 per cent of its payroll for each quarter year, and Chapter 74, Session Laws of Alaska, 1947 (Section 51-5-5, ACLA, 1949), sets up certain credits against these payments according to a formula therein contained, and it requires the defendants to compute the credits and notify the employers, including the plaintiffs, of the amount of the credits, and to give all employers, subject to the provisions of the law, including plaintiffs, the benefit of the credit due, thereby reducing the amount of cash or money contribution required to be paid, until the total amount in the Unemployment Compensation Trust Fund falls below four times the amount of contributions paid on or before the cut-off date,

hereinafter mentioned, for the preceding calendar year, or below 60% of the contributions so paid for such calendar year.

VII.

That "contribution" is defined in the law as "money payments to the Alaska Unemployment Compensation Fund required by this Act" (Section 55-5-1, ACLA, 1949).

VIII.

That the defendants established a "cut-off" date as it is defined in the law, as of March 15, 1950, and notified all employers, including plaintiffs, that no more credits would be granted after July 1, 1950, and that none could be used after that date under the provisions of Chapter 74, Session Laws of Alaska, 1947 (Section 51-5-5, ACLA, 1949), and the Commission issued a bulletin and order to that effect on April 28, 1950.

IX.

That at the "cut-off" date as established by defendants on March 15, 1950, there was in the Trust Fund, which would be the "surplus" as defined in the law, the sum of \$9,397,006.93, and the total contributions by all employers during the preceding year amounted to \$1,370,519.14, so that at the "cut-off" date aforesaid the amount of surplus in the fund exceeded four times the contributions by \$3,914,930.37, and it greatly exceeded 60% of those contributions.

X.

That plaintiffs have credits due them for the last half of 1950 and they will have further credits due for the first six months of the year 1951 in excess of a total sum of \$10,000.00 for New England Fish Company and in excess of \$4,000.00 for Wards Cove Packing Company, but that since these credits are computed by defendants according to a formula set up in the law for their use involving certain classifications and percentages applied thereto, plaintiffs have no means of determining the exact amount thereof, and the "cut-off" date was established and credits discontinued by defendants contrary to law, and the aforesaid order of the Commission of April 28, 1950, is void.

XI.

That on August 28, 1950, application was made in writing to defendants on behalf of plaintiffs and all others similarly situated, to rescind the order fixing the cut-off date as of March 15, 1950, and to restore the credits due plaintiffs and other employers for the last two quarters of 1950 and for the first six months of the year 1951, but the application was denied by defendants.

XII.

That, unless enjoined by the court, defendants threaten to and will deny to plaintiffs and all others similarly situated, any and all credits due them for the quarter ending September 30, 1950, and they will be obliged to pay to defendants during the

month of October, 1950, and, also, during the months of January, April and July, 1951, large cash contributions amounting to many thousands of dollars, which are not due under the law, and which cannot be recovered or credited against future contributions due from them, and defendants threaten to and will enforce the aforesaid order of April 28, 1950, unless enjoined by this court.

XIII.

Plaintiffs will suffer irreparable injury by the acts of the defendants aforesaid, and they have no plain, speedy or adequate remedy at law, and no remedy whatsoever except through the intervention of a court of equity.

Wherefore, plaintiffs pray:

I.

That the court issue herein an order and mandatory injunction directed to defendants, ordering and commanding them to compute and assign to plaintiffs and to all others similarly situated, the credits due them under the provisions of the statutes herein mentioned and under the provisions of Chapter 74, Session Laws of Alaska, 1947 (Section 51-5-5, ACLA, 1949), and to permit them to reduce the amount of cash contributions otherwise required to be paid to the defendants by them for the quarter years ended September 30 and December 31, 1950, and March 31 and June 30, 1951.

II.

That all cash contributions required by defendants to be paid them as Unemployment Compensation contributions during the pendency of this action by plaintiffs and all others similarly situated, in excess of the amounts required by law, be refunded them to the extent of the credits due them for the quarter year covered by the payments.

III.

That the court make such other and further orders and grant plaintiffs such other and further relief as may be meet in the premises.

/s/ H. L. FAULKNER,
FAULKNER, BANFIELD &
BOOCHEVER,
Attorneys for Plaintiffs.

[Endorsed]: Filed October 9, 1950.

In the District Court for the District of Alaska,
Division Number One at Juneau
Civil Cause No. 6377-A

NEW ENGLAND FISH COMPANY, a Corpora-
tion, and WARDS COVE PACKING COM-
PANY, a Corporation, for Themselves and All
Others Similarly Situated.

Plaintiffs and Petitioners,

vs.

GEORGE VAARA, ANTHONY ZORICH,
RALPH J. RIVERS, as the Employment Se-
curity Commission of Alaska, and R. E.
SHELDON, Director and Chief Executive
Thereof,

Defendants.

PETITION FOR REVIEW OF DECISION OF
EMPLOYMENT SECURITY COMMISSION
OF ALASKA

Come now the Plaintiffs and Petitioners, and
complain, allege and petition as follows:

I.

That Plaintiff and Petitioner New England Fish
Company is a corporation organized and existing
under the laws of the State of Maine, and authorized
to do business in Alaska, and it was so authorized
at all times mentioned herein, and it is duly quali-
fied as a corporation doing business in Alaska, and
it has filed its annual reports and paid all corpora-

tion license fees required to do business in the Territory; and that Plaintiff and Petitioner Wards Cove Packing Company is a corporation organized and existing under the laws of Alaska, and authorized to do business therein, and it has filed the annual reports required by law and paid all corporation license fees due the Territory.

II.

That Plaintiffs and Petitioners are members of an association known as the Alaska Salmon Industry, Inc., and they bring this action on their own behalf and on behalf of all other members of the Alaska Salmon Industry, Inc., which itself is a corporation duly organized and composed of member corporations, who are all contributors to the Alaska Unemployment Compensation Fund hereinafter mentioned, and on behalf of all others similarly situated.

III.

That Plaintiff and Petitioner New England Fish Company is now and has, for many years, been engaged in Alaska in the business of catching, purchasing, canning, freezing and shipping fish, including salmon and halibut in Alaska, and it has an annual payroll in Alaska in excess of \$735,000, and it is subject to the provisions of Chapter 4, Session Laws of the Extraordinary Session of the Alaska Legislature of 1937, as amended by Chapters 1 and 51, Session Laws of Alaska, 1939, and Chapter 40, Laws of 1941, Chapters 8, 20 and 50, Laws of 1945, Chapter 32, Laws of 1946, Chapter 74, Laws

of 1947, and Chapter 112, Laws of 1949 (Sections 51-5-1 to 51-5-20, inclusive, ACLA, 1949), known and designated as "Alaska Unemployment Compensation Law"; and that Plaintiff and Petitioner Wards Cove Packing Company is now and for many years has been engaged in the business of catching, purchasing, canning and shipping fish and fish products in Alaska, and it has an annual payroll in excess of \$190,000, and it is subject to the provisions of all of the above-mentioned laws of the Territory.

IV.

That the statutes above mentioned are enforced, and their provisions are required to be administered and are administered by a commission designated "Employment Security Commission of Alaska," and that the Defendants George Vaara, Anthony Zorich and Ralph J. Rivers constitute the present Employment Security Commission of Alaska, and they are the duly appointed and acting members thereof; and the Defendant R. E. Sheldon is the Director and Chief Executive of the Commission.

V.

That Plaintiffs and Petitioners have made payments to the Alaska Unemployment Compensation Fund, as required by the statutes hereinabove mentioned, since the date of the passage of Chapter 4, Session Laws of the Extraordinary Session of the Alaska Legislature of 1937, and they have received certain experience rating credits against their re-

quired payments from July 1, 1947, until June 30, 1950, as provided by Chapter 74, Session Laws of Alaska, 1947 (Sec. 51-5-5, ACLA, 1949); and that during the calendar year 1949 Plaintiff and Petitioner New England Fish Company paid to the Employment Security Commission of Alaska, as required by law, the sum of \$4,903.24, and the sum of \$15,073.52 was assigned to it as credits under the law by the Defendants in accordance with the terms of the statutes; and that during the calendar year 1949 Plaintiff and Petitioner Wards Cove Packing Company paid the Defendants in cash as contributions on its payroll the sum of \$886.89, and it was assigned credits by the Defendants for the calendar year 1949 of \$4,307.83.

VI.

That Chapter 4, Laws of the Extraordinary Session, 1937, as amended by Chapter 74, Session Laws of Alaska, 1947, requires Plaintiffs and Petitioners, and all other employers in Alaska, to pay into the Alaska Unemployment Compensation Trust Fund 2.7 per cent of their payrolls for each quarter year, less certain credits which are set up in Chapter 74, Session Laws of Alaska, 1947, and these credits are set up according to a formula contained in that statute, and under the law the Defendants are required to compute the credits and notify the employers, including Plaintiffs and Petitioners, of the amount of the credits, and to give all employers subject to the provisions of the law, including Plain-

tiffs and Petitioners, the benefit of the credits due, thereby reducing the amount of cash or money contributions required to be paid, until the total amount in the Unemployment Compensation Trust Fund set up under the provisions of the law falls below four times the amount of contributions paid on or before the cut-off date, hereinafter mentioned, for the preceding calendar year, or below 60 per cent of the contributions so paid for such preceding calendar year.

VII.

That "contribution" is defined in the law as "money payments to the Alaska Unemployment Compensation Fund required by this Act" (Section 51-5-1, ACLA, 1949).

VIII.

That the Defendants established a "cut-off" date as it is defined in the law as of March 15, 1950, and notified all employers, including Plaintiffs and Petitioners, that no more credits would be granted after July 1, 1950, and that none could be used after that date under the provisions of Chapter 74, Session Laws of Alaska, 1947 (Section 51-5-5, ACLA, 1949), and the Commission issued a bulletin and order to that effect on April 28, 1950.

IX.

That at the "cut-off" date as established by Defendants on March 15, 1950, there was in the Trust Fund \$9,397,006.93, and the total contributions of all employers during the preceding year amounted

to \$1,370,519.14, so that at the "cut-off" date aforesaid the amount of surplus in the fund exceeded four times the contributions by \$3,914,930.37, and it greatly exceeded 60 per cent of those contributions.

X.

That Plaintiffs and Petitioners have credits due them for the last half of 1950 and they will have further credits due for the first six months of the year 1951 in excess of a total sum of \$10,000.00 for Plaintiff and Petitioner New England Fish Company, and in excess of \$4,000.00 for Plaintiff and Petitioner Wards Cove Packing Company, but that since these credits are computed by Defendants according to a formula set up in the law for their use involving certain classifications and percentages applied thereto, Plaintiffs and Petitioners have no means of determining the exact amount thereof, and the "cut-off" date was established and credits discontinued by Defendants contrary to law, and the aforesaid order of the Commission of April 28, 1950, is void.

XI.

That on August 28, 1950, application was made in writing to Defendants on behalf of Plaintiffs and Petitioners and all others similarly situated, to rescind the order fixing the cut-off date as of March 15, 1950, and to restore the credits due Plaintiffs and Petitioners and other employers for the last two quarters of 1950 and for the first six months of the year 1951, but the application was denied by Defendants.

XII.

That after the cut-off date as defined in the law was established on March 15, 1950, and the Defendants determined to allow no further credits to Plaintiffs and Petitioners and other employers after June 30, 1950, Plaintiffs and Petitioners were required by the Commission and Defendants to pay to the Commission and Defendants into the Trust Fund a full 2.7 per cent of their payrolls for the quarter ending September 30, 1950, and that upon demand of Defendants and under their interpretation of the law, Plaintiffs and Petitioners paid to Defendants 2.7 per cent of their respective payrolls for the quarter ending September 30, 1950, and the payment was made by Plaintiff and Petitioner New England Fish Company on October 9, 1950, and by Plaintiff and Petitioner Wards Cove Packing Company on October 26, 1950.

XIII.

That the amount paid by Plaintiff and Petitioner New England Fish Company for the quarter ending September 30, 1950, as hereinabove set forth was \$14,092.01, and at the time this was paid to Defendants the payment was accompanied by a letter dated October 9, 1950, which letter stated that the payment was being made under protest, and the letter also requested a refund of the amount so paid, to the extent of the credits which Plaintiff and Petitioner New England Fish Company claimed was due it and still claims is due it under the law, a copy of

which letter is hereto attached and made a part of this Petition and marked Exhibit "A"; and the Plaintiff and Petitioner Wards Cove Packing Company accompanied its payment made on October 26, 1950, by a similar letter on its behalf, a copy of which is hereto attached and made a part of this Petition and marked Exhibit "B," and its payment to Defendants for the quarter ending September 30, 1950, was \$4,225.79.

XIV.

That at the time the payment was made on behalf of Plaintiff and Petitioner New England Fish Company as hereinabove set forth, and on October 11, 1950, Plaintiff and Petitioner New England Fish Company petitioned the Commission for an adjustment or refund of the amount paid to the extent of the credits which it claimed, and a copy of its petition is hereto attached and made a part of this Petition and marked Exhibit "C"; and that on October 26, 1950, Plaintiff and Petitioner Wards Cove Packing Company filed with the Commission a similar request for adjustment or refund of its payment, and a copy of its petition is attached to this Petition and made a part hereof and marked Exhibit "D."

XV.

That the petition and request of Plaintiff and Petitioner New England Fish Company was denied by the Employment Security Commission of Alaska, R. E. Sheldon, Executive Director, by letter in

writing addressed to Plaintiff and Petitioner New England Fish Company and dated October 13, 1950, a copy of which is hereto attached and made a part of this Petition and marked Exhibit "E"; and a similar denial was made to the request and petition of Plaintiff and Petitioner Wards Cove Packing Company by letter in writing dated October 26, 1950, and a copy thereof is hereto attached and made a part of this Petition and marked Exhibit "F."

XVI.

That thereafter and on October 13, 1950, Plaintiff and Petitioner New England Fish Company filed with the Employment Security Commission of Alaska a petition for a hearing on its request and petition for adjustment and refund of contributions paid for the quarter ending September 30, 1950, to the extent of the credits due it, and a copy of that petition is hereto attached and made a part of this Petition and marked Exhibit "G"; and that on October 27, 1950, Plaintiff and Petitioner Wards Cove Packing Company filed a similar application and petition for adjustment and refund of contributions paid with the Employment Security Commission of Alaska, a copy of which is hereto attached and made a part of this Petition and marked Exhibit "H."

XVII.

That on October 30, 1950, after such hearing as was agreed to between Plaintiffs and Petitioners and Defendants, and after all facts were presented

to the Commission and to the Defendants, the Defendants made a decision in writing denying the petition of Plaintiff and Petitioner New England Fish Company, and served a copy thereof on Plaintiff and Petitioner New England Fish Company, and a copy thereof is hereto attached and made a part of this Petition and marked Exhibit "I," and the Defendants refused to establish any experience rating credits for Plaintiff and Petitioner New England Fish Company and refused to make any refund or adjustment of the amounts so paid for the quarter ending September 30, 1950; and on the same date the Defendants and the Commission took a similar action with reference to Plaintiff and Petitioner Wards Cove Packing Company, and a copy of the Commission's decision in the case of the application of Plaintiff and Petitioner Wards Cove Packing Company is hereto attached and made a part of this Petition and marked Exhibit "J."

XVIII.

That Plaintiffs and Petitioners have exhausted all administrative remedies provided in the aforesaid laws.

XIX.

That Plaintiffs and Petitioners allege that in making the computation of surplus in the Unemployment Compensation Trust Fund as defined in the law, the Defendants wrongfully added to the contributions paid for the calendar year 1949 the amount of credits which had been assigned to all

employers during the calendar year 1949, and multiplied that amount by four, whereas the amount which should have been multiplied by four was the total of all contributions paid during the calendar year 1949, and that if the proper computation had been made, there would have been in the Fund a surplus as of the cut-off date available for further credits during the year commencing July 1, 1950, in the sum of \$3,914,930.37 as set forth in Paragraph IX of this Petition.

Wherefore, Plaintiffs and Petitioners pray that the orders and decisions of the Defendants and the Employment Security Commission of Alaska dated October 30, 1950, be set aside and held for naught, and that the orders and decisions of the Defendants be reversed and that they be required to recompute the amount of surplus in the Unemployment Compensation Trust Fund as of March 15, 1950, as the amount which exceeds four times the sum of \$1,370,-514.14, which was the amount of money payments or contributions paid during the year 1949, and that the difference between that sum and the total amount in the Unemployment Compensation Trust Fund as of March 15, 1950, be applied as credits and assigned to all employers in accordance with the formula set up in Chapter 74, Session Laws of

Alaska, 1947, and that the Court make all necessary orders in the premises.

Dated at Juneau, Alaska, October 31, 1950.

/s/ H. L. FAULKNER,
FAULKNER, BANFIELD &
BOOCHEVER,
Attorneys for Plaintiffs and
Petitioners.

Four copies received this 31st day of October,
1950.

EMPLOYMENT SECURITY COMMISSION OF
ALASKA,

By /s/ R. E. SHELDON,
Director and Chief Executive.

One copy received this 31st day of October, 1950.

/s/ JOHN H. DIMOND,
Assistant Attorney General for Alaska, Attorney for
Defendants.

EXHIBIT "A"

New England Fish Co.
1828 Exchange Building
Seattle 4, Washington

October 9th, 1950

The Employment Security Commission of Alaska
and R. E. Sheldon, Director and Chief Executive
Thereof,

P. O. Box 2661
Juneau, Alaska.

Dear Sirs:

There is enclosed on behalf of the undersigned employer the Employer's Contribution Reports on your Form 1004 Revised, for the quarter ending September 30th, 1950. We also enclose our check in the sum of \$14,092.01 in payment of the contributions which are prescribed under the provisions of the law (Section 51-5-5 A.C.L.A. 1949). This is at the rate of 2.7 per cent of the entire payroll.

The payment is made at that rate and in the amount hereinabove set forth and as represented by the enclosed check for the reason that no credits have been assigned by you for the year commencing July 1, 1950, as provided by Chapter 74, S.L.A. 1947 (Section 51-5-5 A.C.L.A. 1949). The undersigned is of the opinion that certain credits are due employers for the year commencing July 1, 1950, and that these credits should have been computed and notice thereof given the undersigned, thereby reducing the amount of the contribution paid here-

with to the extent of the credit for the quarter ended September 30th, 1950.

The amount enclosed is being paid under protest for the reason that credits have not been computed and given to the undersigned; and application is respectfully made to the Commission and to the Director and Chief Executive thereof to compute and assign the credits due the undersigned for the year 1950-51 and assign the credit which is due for the September quarter and refund the amount of the contribution enclosed to the extent of the credit due.

Very respectfully,

NEW ENGLAND FISH
COMPANY,

By /s/ OSCAR BERGSETH,
General Supt.

EXHIBIT "B"

Wards Cove Packing Co., Inc.
Packers of Choice Alaska Salmon
Ketchikan, Alaska

Oct. 24, 1950

The Employment Security Commission and
R. E. Sheldon, Director and Chief Executive
Thereof.

P. O. Box 2661
Juneau, Alaska.

Dear Sirs:

There is enclosed on behalf of the undersigned employer the Employer's Contribution Report on

your form 1004 Revised, for the quarter ending September 30, 1950. We also enclose our check in the sum of \$4225.79 in payment of the contributions which are prescribed under the provisions of the law (Section 51-5-5 A.C.L.A. 1949). This is at the rate of 2.7 per cent of the entire payroll.

The payment is made at that rate and in the amount hereinabove set forth and as represented by the enclosed check for the reason that no credits have been assigned by you for the year commencing July 1, 1950, as provided by Chapter 74, S.L.A. 1947 (Section 51-5-5 A.C.L.A. 1949). The undersigned is of the opinion that certain credits are due employers for the year commencing July 1, 1950, and that these credits should have been computed and notice thereof given the undersigned, thereby reducing the amount of the contribution paid herewith to the extent of the credit for the quarter ending September 30, 1950.

The amount enclosed is being paid under protest for the reason that credits have not been computed and given to the undersigned, and application is respectfully made to the Commission and to the Director and Chief Executive thereof to compute and assign the credits due the undersigned for the year 1950-51 and assign the credit which is due for the September quarter and refund the amount of the contribution enclosed to the extent of the credit due.

Respectfully,

WARDS COVE PACKING CO.,

By /s/ H. A. BRINDLE,

Vice President.

EXHIBIT "C"

In the Matter of the Petition of New England Fish Company, a Corporation, for Adjustment of Claim for Refund and for Refund of Contributions Paid

To: Employment Security Commission
Territory of Alaska
Juneau, Alaska

The New England Fish Company, a corporation organized under the laws of the State of Maine, and doing business in Alaska, has paid, under the provisions of the Unemployment Compensation Law of Alaska, the sum of \$14,092.01 covering contributions under the Alaska Unemployment Compensation Law for the quarter ended September 30, 1950. The payment was made under protest, which was in writing and signed by the company and dated October 9, 1950, and reference is made thereto. This letter of protest also contained a request for a refund of the amount paid to the extent of the credits which the Petitioner claims should have been allowed by you and credited against the contribution for the September quarter, 1950, under the provisions of Chapter 74, Session Laws of Alaska, 1947 (51-5-5 A.C.L.A. 1949).

The Petition for adjustment or refund has been denied by the Executive Director.

The reasons for this petition for adjustment or

refund are contained in the letter of protest referred to hereinabove.

Dated at Juneau, Alaska, October 11, 1950.

NEW ENGLAND FISH
COMPANY,

By /s/ H. L. FAULKNER,
Its Attorney and Agent.

EXHIBIT "D"

October 26, 1950

Employment Security Commission
Territory of Alaska
Juneau, Alaska

In the Matter of the Petition of Wards Cove Packing Company, a Corporation, for Adjustment of Claim for Refund and for Refund of Contributions Paid.

Dear Sirs:

The Wards Cove Packing Company, a corporation organized under the laws of Alaska, and doing business in Alaska, has paid, under the provisions of the Unemployment Compensation Law of Alaska, the sum of \$4,225.79, covering contributions for the quarter ended September 30, 1950. The payment was made under protest, which was in writing and signed by the company, and dated October 24, 1950, and reference is made thereto. This letter of protest also contained a request for a refund of the amount paid to the extent of the credits

which the petitioner claims should have been allowed by you and credited against the contribution for the September quarter, 1950, under the provisions of Chapter 74, Session Laws of Alaska, 1947 (51-5-5 A.C.L.A. 1949).

It is respectfully requested that an adjustment be made as requested in the letter of protest and request for refund, and that a refund be made to the company for an amount equal to the credits which are due the company for the September quarter, 1950.

Very truly yours,

WARDS COVE PACKING
COMPANY,

By /s/ H. L. FAULKNER,

Its Attorney and Agent.

EXHIBIT "E"

3298

Juneau, Alaska

October 13, 1950

New England Fish Company
1828 Exchange Building
Seattle 4, Washington

Attention of Mr. Oscar Bergseth
General Superintendent

Gentlemen:

Receipt is acknowledged of contribution reports and wage schedules for the quarter ending Septem-

ber 30, 1950, covering your five branch accounts, and your check in payment therefor in the amount of \$14,092.01, such payment being made under protest.

Receipt is also acknowledged of Claim for Refund of \$14,092.01 being the amount of contributions paid as outlined above, such claim being made under the provisions of Section 51-5-14(f) ACLA 1949.

Your claim is presented on the premise there was more than four times the amount of 1949 contributions in the unemployment compensation fund on March 15, 1950, and in that event the law provides for experience rating credits being made available for qualified employers, and, by inference, that your Corporation is such an employer.

Claim for Refund of contributions covering your five branch accounts for the quarter ending September 30, 1950, in the amount of \$14,092.01 is hereby denied. This denial is based on the fact that there was not a surplus in the fund on March 15, 1950, and, therefore, there were no amounts to be distributed among otherwise qualified employers. The facts are that there was a balance in the unemployment compensation fund in the amount of \$9,397,006.93; the amount of contributions reported on and paid for, applicable to the calendar year 1949, was \$2,386,932.63, and four times this latter figure is more than the fund balance.

A copy of this letter is being handed to your Counsel, Faulkner, Banfield and Boochever, attorneys at Juneau, Alaska.

You are advised that if you do not agree with this denial of claim for refund you may file a

petition in writing with the Commission for a hearing thereon, such petition to be submitted within thirty (30) days after October 13, 1950, the date of mailing of this notification of denial.

Very truly yours,

**EMPLOYMENT SECURITY COMMISSION OF
ALASKA,**

R. E. SHELDON,
Executive Director.

By /s/ **G. F. CRISMAN,**
G. F. CRISMAN,
Coordinator.

GFC:ms

EXHIBIT "F"

Territory of Alaska
Employment Security Commission
Box 2661, Juneau

R. E. Sheldon
Executive Director
Territorial Employment Service

Affiliated With
U. S. Employment Service
Unemployment Insurance Division

October 26, 1950

In reply refer to: 3911
Faulkner, Banfield & Boochever
P. O. Box 1121
Juneau, Alaska

Gentlemen:

Attention: Mr. H. L. Faulkner

Receipt is acknowledged of contribution reports and wage schedules for quarter ending September 30, 1950, covering the two branch accounts of the Wards Cove Packing Co., Inc., and its check in payment therefor in the amount of \$4,225.79.

Receipt is also acknowledged of Claim for Refund of \$4,225.79 being the amount of contributions paid as outlined above, such claim being made under the provisions of Section 51-5-14 (f) ACLA 1949.

The claim is presented on the premise there was more than four times the amount of 1949 contributions in the unemployment compensation fund on March 15, 1950, and in that event the law provides

for experience rating credits being made available for qualified employers, and, by inference, that your Corporation is such an employer.

Claim for Refund of contributions for the Wards Cove Packing Co., Inc., for the quarter ending September 30, 1950, in the amount of \$4,225.79 is hereby denied. This denial is based on the fact that there was not a surplus in the fund on March 15, 1950, and, therefore, there were no amounts to be distributed among otherwise qualified employers. The facts are that there was a balance in the unemployment compensation fund in the amount of \$9,397,006.93; the amount of contributions reported on and paid for, applicable to the calendar year 1949, was \$2,386,932.63, and four times this latter figure is more than the fund balance.

You are advised that if this denial of claim for refund is not agreed to a petition in writing to the Commission for hearing thereon may be submitted within 30 days after this date, which is date of mailing of this notification of denial.

Very truly yours,

EMPLOYMENT SECURITY
COMMISSION OF ALASKA,
R. E. SHELDON,
Executive Director.

By /s/ G. F. CRISMAN,
Coordinator.

GFC:ps

EXHIBIT "G"

Petition of New England Fish Company, a Corporation, for a Hearing on Its Petition for Adjustment and Refund of Contributions Paid for September Quarter 1950

To: Employment Security Commission
Territory of Alaska
Juneau, Alaska

The New England Fish Company, a corporation organized under the laws of the State of Maine, and doing business in Alaska, respectfully represents to the Commission:

1. That the Petitioner is a corporation organized under the laws of the State of Maine, and at all times mentioned herein, authorized to do business in the Territory of Alaska, and it is and was at all times mentioned herein an employer within the meaning of the Alaska Unemployment Compensation Law, and it has an annual payroll in the Territory of Alaska in excess of \$800,000.00, and it has paid contributions to the Unemployment Compensation Fund as required by law since the date of the passage of the Alaska Unemployment Compensation Act.

2. That under the provisions of Chapter 74, Session Laws of Alaska, 1947 (Section 51-5-5 A.C.L.A. 1949), a system of experience rating credits is set up, which system is applicable to Petitioner, and these credits are based on a formula contained in the law, and they are computed by the

Commission and the Director and Chief Executive thereof, and they were so computed and allowed each quarter from July 1, 1947, until and including June 30, 1950.

3. That in May, 1950, the Petitioner was informed that no further credits would be allowed by the Commission, for the reason that there was not sufficient surplus in the Unemployment Compensation Trust Fund as of March 15, 1950, which was the cut-off date established by the Commission under the provisions of the law hereinabove referred to, and that the moneys in the Unemployment Compensation Trust Fund as of the cut-off date did not exceed four times the amount of contributions paid on or before the cut-off date for the preceding calendar year.

4. That in computing the contributions paid by all employers for the preceding calendar year, or the calendar year 1949, the Commission added the total contributions paid in money during the year 1949 to the amount of credits allowed during the year 1949 and multiplied this combination by four, and by doing so arrived at a figure of \$9,547,730.52, whereas at the cut-off date there was in the Unemployment Compensation Trust Fund the sum of \$9,397,006.93, which, under the method used by the Commission, would result in a deficit in the Unemployment Compensation Trust Fund.

5. That the total amount of contributions paid in money by all employers during the calendar year 1949 was \$1,370.519.14, and four times that amount

is \$5,482,076.56, so that if the Commission had computed the surplus as four times the amount of contributions paid in money by all employers during the calendar year 1949, there would be the sum of \$3,914,930.37 in the fund in excess of the required surplus, and which amount would be available for credits during the year commencing July 1, 1950, and ending June 30, 1951.

6. That on October 11, 1950, the Petitioner paid to the Employment Security Commission the sum of \$14,092.01 covering contribution on its payroll for the months of July, August and September at the rate of 2.7 per cent, and this was paid under protest with an application for a refund to the extent of the credits which should have been allowed Petitioner, and the payment was accompanied by the returns on behalf of Petitioner as required by law, and all supporting documents.

7. Petitioner is entitled to the credits for the September quarter 1950 as provided by the laws of the Territory, and the contribution paid by it under protest, as hereinabove set forth, should be refunded to the extent of the credits which will be allowable to Petitioner, and which can be computed only by the Commission, but Petitioner believes, and therefore alleges, that these credits are in excess of \$7,000.00.

8. That application has been made to the Commission, on October 11, 1950, for a refund of the contribution to the extent hereinabove set forth, and the application has been denied.

Wherefore, Petitioner prays that the Commission grant a hearing to it, and upon the hearing, order the credits set up as provided by law, and that the amount of the credit be refunded to the Petitioner from the amount of contribution paid in cash for the September quarter, as hereinabove set forth.

Dated at Juneau, Alaska, October 13, 1950.

NEW ENGLAND FISH
COMPANY,

By /s/ H. L. FAULKNER,
Its Attorney and Agent.

EXHIBIT "H"

Petition of Wards Cove Packing Company, a Corporation, for a Hearing on Its Petition for Adjustment and Refund of Contributions Paid for the September Quarter 1950

To: Employment Security Commission
Territory of Alaska
Juneau, Alaska

The Wards Cove Packing Company, a corporation organized under the laws of Alaska and doing business in Alaska, respectfully represents to the Commission:

1. That the Petitioner is a corporation organized under the laws of the Territory of Alaska and at all times mentioned herein, authorized to do business in Alaska, and it is and was at all times

mentioned herein an employer within the meaning of the Alaska Unemployment Compensation Law, and it has an annual payroll in the Territory of Alaska in excess of \$190,000.00, and it has paid contributions to the Unemployment Compensation Fund as required by law since the date of the passage of the Alaska Unemployment Compensation Act.

2. That under the provisions of Chapter 74, Session Laws of Alaska, 1947 (Section 51-5-5 A.C.L.A. 1949), a system of experience rating credits is set up, which system is applicable to Petitioner, and these credits are based on a formula contained in the law, and they are computed by the Commission and the Director and Chief Executive thereof, and they were so computed and allowed each quarter from July 1, 1947, until and including June 30, 1950.

3. That in May, 1950, the Petitioner was informed that no further credits would be allowed by the Commission, for the reason that there was not sufficient surplus in the Unemployment Compensation Trust Fund as of March 15, 1950, which was the cut-off date established by the Commission under the provisions of the law hereinabove referred to, and that the moneys in the Unemployment Compensation Trust Fund as of the cut-off date did not exceed four times the amount of contributions paid on or before the cut-off date for the preceding calendar year.

4. That in computing the contributions paid by all employers for the preceding calendar year, or the calendar year 1949, the Commission added the total contributions paid in money during the year 1949 to the amount of credits allowed during the year 1949 and multiplied this combination by four, and by doing so arrived at a figure of \$9,547,730.52, whereas at the cut-off date there was in the Unemployment Compensation Trust Fund the sum of \$9,397,006.93, which, under the method used by the Commission, would result in a deficit in the Unemployment Compensation Trust Fund.

5. That the total amount of contributions paid in money by all employers during the calendar year 1949 was \$1,370,519.14, and four times that amount is \$5,482,076.56, so that if the Commission had computed the surplus as four times the amount of contributions paid in money by all employers during the calendar year 1949, there would be the sum of \$3,914,930.37 in the fund in excess of the required surplus, and which amount would be available for credits during the year commencing July 1, 1950, and ending June 30, 1951.

6. That on October 26, 1950, the Petitioner paid to the Employment Security Commission of Alaska the sum of \$4,225.79, covering contribution on its payroll for the months of July, August and September, 1950, at the rate of 2.7 per cent as demanded by the Commission, and this was paid under protest with an application for a refund to the extent of the credits which should have been allowed

Petitioner, and the payment was accompanied by the returns on behalf of Petitioner as required by law, and all supporting documents.

7. Petitioner is entitled to the credits for the September quarter, 1950, as provided by the laws of the Territory, and the contribution paid by it under protest, as hereinabove set forth, should be refunded to the extent of the credits which will be allowable to Petitioner, and which can be computed only by the Commission, but Petitioner believes, and therefore alleges, that these credits are in excess of \$2,000.00.

8. That application has been made to the Commission on October 26, 1950, for a refund of the contribution to the extent hereinabove set forth, and the application has been denied.

Wherefore, Petitioner prays that the Commission grant a hearing to it, and upon the hearing, order the credits set up as provided by law, and that the amount of the credit be refunded to the Petitioner from the amount of contribution paid in cash for the September quarter, as hereinabove set forth.

Dated at Juneau, Alaska, October 27, 1950.

WARDS COVE PACKING
COMPANY,

By /s/ H. L. FAULKNER,
Its Attorney and Agent.

EXHIBIT I

Territory of Alaska
Employment Security Commission
Box 2661, Juneau

October 30, 1950

In reply refer to: 3298.

New England Fish Company
c/o Faulkner, Banfield & Boochever
P. O. Box 1121
Juneau, Alaska

Attention of Mr. H. L. Faulkner, Its Attor-
ney and Agent

Gentlemen:

Receipt is acknowledged of Petition for Hearing filed by you October 13, 1950, pursuant to the provisions of Section 51-5-14 (f) ACLA 1949.

This petition was submitted following this Commission's denial of your Claim for Refund in the amount of \$14,092.01, covering contributions paid at the rate of 2.7 per centum on wages payable subject to the Employment Security Law for the calendar quarter ending September 30, 1950, said denial having been mailed to you October 13, 1950.

The aforesaid Claim for Refund was submitted to this Commission "for the reason that the law provides for continuance of credits until the surplus fund falls below four times the amount of contributions for the previous year, to the cut-off date, and at the cut-off date the surplus amounted to \$3,914,-930.40, more than four times the contributions paid by all employers for the preceding year."

The Commission's letter of denial, dated October 13, 1950, advised that the denial "is based on the fact that there was not a surplus in the fund on March 15, 1950, and, therefore, there were no amounts to be distributed among otherwise qualified employers. The facts are that there was a balance in the unemployment compensation fund in the amount of \$9,397,006.93; the amount of contributions reported on and paid for, applicable to the calendar year 1949, was \$2,386,932.63, and four times this latter figure is more than the fund balance."

Your petition makes eight representations to the Commission. With respect to Representation 1, you are advised that your taxable payroll in the Territory of Alaska for 1949 was \$739,880.58; for 1948, \$794,856.84; for 1947, \$701,889.58, and for 1946, \$790,590.48. None of these amounts exceeds \$800,000.00 as represented. Other parts of Representation 1 are conceded.

With respect to Representation 2, computations of experience rating credits and allowance of credits to qualified employers were made with respect to the three credit years beginning July 1, 1947, and ending June 30, 1950, all in accordance with the provisions of Section 51-5-5 (c) of the Law, *supra*. In the first credit year, July 1, 1947, through June 30, 1948, no experience rating credit having previously been distributed, all contributions having been made in cash with respect to the calendar year 1946, contributions paid with respect to payrolls in the year 1946 reported on by March 15th and paid by June 30, 1947, were used in the formula of

“surplus.” For the second credit year, July 1, 1948, through June 30, 1949, experience rating credit having been distributed and being applicable to the second half of the calendar year 1947, contributions paid with respect to payrolls in the calendar year 1947—both “cash” and credits applied—were used in the formula of “surplus.” For the third credit year, July 1, 1949, through June 30, 1950, experience rating credit having been distributed and being applicable to the entire calendar year 1948—both “cash” and credits applied, were used in the formula of “surplus.” The same administrative determination was made with respect to the potential credit year July 1, 1950, through June 30, 1951, and this resulted in the fact there was no surplus, as defined, distributable. No protest with respect to previous credit years has been received from any employer. For your information, it is a matter of record that the amount of experience credits distributed for the credit year 1949-50, was \$1,390,-480.39 based upon the previously uncontested administrative determination. Had your contention been followed that only “cash” contributions be used in this determination, the amount of credit distributable would have been only \$845,067.46. Your individual credit for the credit year 1949-50 was \$17,645.82, all of which you used in applying it against the 2.7 per centum rate on wages payable; under your contention, only \$10,724.28 would have been credited to your account.

With respect to Representation 3, this Commission notified all employers of record subject to the

Employment Security Law under date of April 28, 1950, by means of a Mimeographed letter, that there was not a surplus in the fund as of March 15, 1950.

With respect to Representation 4, this Commission determined the amount of contributions due and reported on by all employers by March 15, 1950, which were applicable to the calendar year 1949, and the amount so determined was \$2,386,932.63. The Fund balance as of March 15, 1950, was \$9,-397,006.93. The formula for "surplus" was applied and it was found that four times the amount of contributions applicable to the calendar year 1949, which were reported by the cut-off date March 15, 1950, exceeded the Fund balance.

With respect to Representation 5, we concur that the amount of contributions paid in "cash" by employers on or before March 15, 1950, with respect to wages payable in the calendar year 1949, was \$1,370,519.14 and that four times this amount is \$5,482,076.56, but our contention is that this is not germane to the formula to be used in arriving at the amount of a "surplus." With regard to the balance of this Representation, you are advised that it was and is our administrative determination that if the Commission had used the hypothesis outlined by you in applying the formula for "surplus," it would be placing an incorrect meaning on the plain language of the statute.

The word "contributions" is defined as "As used in this Act, unless the context clearly requires otherwise, 'contributions' means the money payments to the Alaska unemployment compensation fund

required by this Act." The amount of "money payments" in this definition is not determinable, but elsewhere in the Law, there is prescribed a rate of contributions, such rate being 2.7 per centum after December 31, 1937, with respect to employment. To determine what basis should be used to apply the 2.7 per centum rate, we must examine other definitions, such as "employment," "wages," "remuneration," and so on. The word "contributions" occurs in the definition of "qualified employer." In this definition, you will notice that "qualified employer" means any employer who "... had employment for which remuneration was payable in each of the four consecutive calendar years preceding the computation date (January 1st) and who filed any wage reports required thereon on or before the cut-off date (March 15th), and has paid all contributions due on or before the effective date (June 30th)."

The word "contributions" appears in the definition of "surplus." "'Surplus' means the lesser of that amount by which the moneys . . . exceed four times the amount of contributions paid . . . with respect to the payrolls reported by all employers on or before said cut-off date . . ., or an amount equal to 60% of the contributions so paid."

Employers' payrolls are the determining factor throughout the provisions of the experience rating amendment to the Law. Payrolls of qualified and non-qualified employers are used in the formula for distribution of a surplus. Some employers who are qualified employers, as defined, will not participate in the distribution of a surplus if their pay-

rolls have declined in preceding calendar years in excess of 79 per centum, whereas other qualified employers will participate in the distribution of a surplus if their payrolls have not declined at all, or have declined in varying lesser degrees.

With respect to Representation 6, the Commission concurs.

With respect to Representation 7, the Commission does not concur.

With respect to Representation 8, the Commission concurs.

Inasmuch as no new facts have been presented in your Petition for Hearing, other than were contained in your claim for Refund, it is our opinion that no good purpose would be served by a hearing before the Commission. For this reason, and without prejudice, your Petition for Hearing on the denial of your claim for refund is herewith denied. This denial of your petition exhausts your administrative remedies under the Act. A petition for refund may now be presented to the United States District Court in accordance with Section 51-5-14 (f), *supra*.

Very truly yours,

/s/ R. E. SHELDON,

R. E. SHELDON,

Executive Director.

RES:s

EXHIBIT J

Territory of Alaska
Employment Security Commission
Box 2661, Juneau

October 30, 1950

In reply refer to: 3911
Wards Cove Packing Company
c/o Faulkner, Banfield & Boochever
P. O. Box 1121
Juneau, Alaska

Attention of Mr. H. L. Faulkner, Its Attorney and Agent

Gentlemen:

Receipt is acknowledged of Petition for Hearing filed by you October 27, 1950, pursuant to the provisions of Section 51-5-14 (f) ACLA 1949.

This petition was submitted following this Commission's denial of your Claim for Refund in the amount of \$4,225.79, covering contributions paid at the rate of 2.7 per centum on wages payable subject to the Employment Security Law for the calendar quarter ending September 30, 1950, said denial having been mailed to you October 26, 1950.

The aforesaid Claim for Refund was contained in your letter of October 26, 1950, and was based on your opinion that certain credits are due employers for the (credit) year commencing July 1, 1950, and that these credits should have been computed and notice thereof given to you, thereby reducing the amount of contributions which you paid with respect to the quarter ending September 30, 1950.

The Commission's letter of denial, dated October 26, 1950, advised that the denial "is based on the fact that there was not a surplus in the fund on March 15, 1950, and, therefore, there were no amounts to be distributed among otherwise qualified employers. The facts are that there was a balance in the unemployment compensation fund in the amount of \$9,397,006.93; the amount of contributions reported on and paid for, applicable to the calendar year 1949, was \$2,386,932.63, and four times this latter figure is more than the fund balance."

Your petition makes eight representations to the Commission. With respect to Representation 1, you are advised that your taxable payrolls in the Territory of Alaska for 1948-49 were in excess of \$190,000, but in previous years, were considerably less. Other parts of Representation 1 are conceded.

With respect to Representation 2, computations of experience rating credits and allowance of credits to qualified employers were made with respect to the three credit years beginning July 1, 1947, and ending June 30, 1950, all in accordance with the provisions of Section 51-5-5 (c) of the Law, *supra*. In the first credit year, July 1, 1947, through June 30, 1948, no experience rating credit having previously been distributed, all contributions having been made in cash with respect to the calendar year 1946, contributions paid with respect to payrolls in the year 1946 reported on by March 15th and paid by June 30, 1947, were used in the formula of "surplus." For the second credit year, July 1, 1948, through June 30, 1949, experience rating

credit having been distributed and being applicable to the second half of the calendar year 1947, contributions paid with respect to payrolls in the calendar year 1947—both “cash” and credits applied—were used in the formula of “surplus.” For the third credit year, July 1, 1949, through June 30, 1950, experience rating credit having been distributed and being applicable to the entire calendar year 1948—both “cash” and credits applied, were used in the formula of “surplus.” The same administrative determination was made with respect to the potential credit year July 1, 1950, through June 30, 1951, and this resulted in the fact there was no surplus, as defined, distributable. No protest with respect to previous credit years has been received from any employer. For your information, it is a matter of record that the amount of experience credits distributed for the credit year 1949-50, was \$1,390,480.39 based upon the previously uncontested administrative determination. Had your contentions been followed that only “cash” contributions be used in this determination, the amount of credit distributable would have been only \$845,067.46.

Your credit for the credit year 1949-50, was \$5,808.19. You absorbed the credit remaining in the account of Red Salmon Canning Company as of January 1, 1950, when you took over the assets of that corporation. The amount of credit for the credit year 1949-50 for the Red Salmon Canning Company was \$17,711.98; there was a balance remaining of \$9,862.62, unapplied credit, which you

absorbed, making a total credit available to you for the credit year of \$15,670.81. Under your contention, your credit would have been reduced to \$3,529.94. Red Salmon Canning Company's credit would have been reduced to \$10,764.49; having used \$7,849.36 of it in the latter half of the calendar year 1949, only \$2,915.13 would have remained to be absorbed by you; therefore, total credit available to you with respect to the credit year 1949-50 would have been only \$6,445.07, not \$15,670.81.

With respect to Representation 3, this Commission notified all employers of record subject to the Employment Security Law under date of April 28, 1950, by means of a Mimeographed letter, that there was not a surplus in the fund as of March 15, 1950.

With respect to Representation 4, this Commission determined the amount of contributions due and reported on by all employers by March 15, 1950, which were applicable to the calendar year 1949, and the amount so determined was \$2,386,932.63. The Fund balance as of March 15, 1950, was \$9,397,006.93. The formula for "surplus" was applied and it was found that four times the amount of contributions applicable to the calendar year 1949, which were reported by the cut-off date March 15, 1950, exceeded the Fund balance.

With respect to Representation 5, we concur that the amount of contributions paid in "cash" by employers on or before March 15, 1950, with respect to wages payable in the calendar year 1949, was \$1,370,519.14 and that four times this amount is \$5,482,076.56, but our contention is that this is not germane to the formula to be used in arriving at

the amount of a "surplus." With regard to the balance of this Representation, you are advised that it was and is our administrative determination that if the Commission had used the hypothesis outlined by you in applying the formula for "surplus," it would be placing an incorrect meaning on the plain language of the statute.

The word "contributions" is defined as "As used in this Act, unless the context clearly requires otherwise, 'contributions' means the money payments to the Alaska unemployment compensation fund required by this Act." The amount of "money payments" in this definition is not determinable, but elsewhere in the Law, there is prescribed a rate of contributions, such rate being 2.7 per centum after December 31, 1937, with respect to employment. To determine what basis should be used to apply the 2.7 per centum rate, we must examine other definitions such as "employment," "wages," "remuneration," and so on. The word "contributions" occurs in the definition of "qualified employer." In this definition, you will notice that "qualified employer" means any employer who "... had employment for which remuneration was payable in each of the four consecutive calendar years preceding the computation date (January 1st) and who filed any wage reports required thereon on or before the cut-off date (March 15th), and has paid all contributions due on or before the effective date (June 30th)."

The word "contributions" appears in the definition of "surplus." "'Surplus' means the lessor of that amount by which the moneys . . . exceed four times the amount of contributions paid . . . with

respect to the payrolls reported by all employers on or before said cut-off date . . . , or an amount equal to 60% of the contributions so paid.”

Employers’ payrolls are the determining factor throughout the provisions of the experience rating amendment to the Law. Payrolls of qualified and non-qualified employers are used in the formula for distribution of a surplus. Some employers who are qualified employers, as defined, will not participate in the distribution of a surplus if their payrolls have declined in preceding calendar years in excess of 79 per centum, whereas other qualified employers will participate in the distribution of a surplus if their payrolls have not declined at all, or have declined in varying lesser degrees.

With respect to Representation 6, the Commission concurs.

With respect to Representation 7, the Commission does not concur.

With respect to Representation 8, the Commission concurs.

Inasmuch as no new facts have been presented in your Petition for Hearing, other than were contained in your Claim for Refund, it is our opinion that no good purpose would be served by a hearing before the Commission. For this reason, and without prejudice, your Petition for Hearing on the denial of your claim for refund is herewith denied. This denial of your petition exhausts your administrative remedies under the Act. A petition for refund may now be presented to the United States

District Court in accordance with Section 51-5-14 (f), *supra*.

Very truly yours,

/s/ R. E. SHELDON,

R. E. SHELDON,

Executive Director.

RES:s

[Endorsed]: Filed October 31, 1950.

[Title of District Court and Cause.]

Civil Cause No. 6377-A

STIPULATION

It Is Hereby Stipulated and Agreed between New England Fish Company, a corporation, and Wards Cove Packing Company, a corporation, the above-named Plaintiffs and Petitioners, through their attorney, H. L. Faulkner, and the above-named Defendants, through their attorney, John Dimond, Assistant Attorney General of Alaska, that all actions of the Employment Security Commission of Alaska referred to in the Petition for Review of Decision of Employment Security Commission of Alaska on file in the above-entitled cause be and they are hereby considered the actions and decisions of the full Employment Security Commission of Alaska, and the Plaintiffs and Petitioners accept the actions and decisions and findings of the Executive Director as those of the full Commission, and Plaintiffs and Petitioners waive any right they may have to have the full Commission act upon the Petition for a Hearing on the Request and Petition for

Adjustment and Refund of Contributions Paid for the Quarter Ending September 30, 1950; and

It Is Stipulated between the parties hereto that in the above-entitled cause and petition, the Court shall consider the Petition for Refund and Adjustment made by Plaintiffs and Petitioners, and at the hearing either party may present evidence, and that the Court may decide the matter on the issue raised in the petitions of Plaintiffs and Petitioners in their respective petitions of October 13, 1950, and October 27, 1950, Exhibits "G" and "H" referred to in Paragraph XVI of the Petition for Review of Decision of Employment Security Commission of Alaska, and copies of which are made a part of the Petition.

It Is Further Stipulated that a hearing may be had upon the Petition and such answer thereto as the Defendants desire to file before the Court at Juneau during the week beginning November 6 and as soon as the matter may be heard by the Court.

Dated at Juneau, Alaska, the 31st day of October, 1950.

/s/ H. L. FAULKNER,
FAULKNER, BANFIELD &
BOOCHEVER,
Attorneys for Plaintiffs and
Petitioners.

/s/ JOHN H. DIMOND,
Assistant Attorney General of Alaska, Attorney for
Defendants.

[Endorsed]: Filed October 31, 1950.

[Title of District Court and Cause.]

Civil Cause No. 6356-A

ANSWER

To the complaint herein, defendants above-named, through their attorneys, answer as follows, to wit:

First Defense

1. Answering Paragraph I of the complaint, defendants admit the allegations contained therein.

2. Answering Paragraph II of the complaint, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

3. Answering Paragraph III of the complaint, defendants admit the allegations contained therein. Defendants allege, however, that the figure of \$842,501.02 given in said Paragraph III as the approximate annual payroll in Alaska for the plaintiff New England Fish Company, is the amount of said plaintiff's payroll for the "credit year" July 1, 1949, to June 30, 1950; and that the payroll for said plaintiff for the calendar year January 31, 1949, to December 31, 1949, which is the payroll with respect to which contributions become payable under the Alaska Employment Security Law (§51-5-5 ACLA 1949), was \$739,880.58.

4. Answering Paragraph IV of the complaint, defendants admit the allegations contained therein.

5. Answering Paragraph V of the complaint, defendants admit the allegations contained therein, with the exception of the figure of \$4,313.88, mentioned in the last line of said Paragraph V, and allege that said figure should be \$4,307.83. Defendants allege, however, that although plaintiff, New England Fish Company, did make contributions of \$5,101.72 in cash and \$17,645.88 in credits for the "credit year" July 1, 1949, to June 30, 1950, that its contributions for the calendar year January 1, 1949, to December 31, 1949, which were based on its payroll of \$739,880.58, for said calendar year, were in the amount of \$4,903.24, in cash and \$15,073.52, in experience rating credits; and that contributions based on a calendar year payroll, and not those based on a credit year payroll, enter into the computation of "surplus" in §51-5-5(c) (1) (G) ACLA 1949.

6. Answering Paragraph VI of the complaint, defendants admit the allegations contained therein with the following exceptions:

a. Defendants deny the interpretation placed by plaintiffs on the Alaska Employment Security Law to the effect that said law requires employers to pay into the Alaska Unemployment Compensation Fund 2.7 per cent "of its payroll for each quarter year," and defendants allege that said law requires each employer to pay into said Fund 2.7 per cent of the wages payable by him with respect to employment during the calendar year.

b. Defendants deny the interpretation of the

Employment Security Law, as alleged by plaintiffs, to the effect that credits are assigned to qualified employers until the amount of cash contribution required to be paid reaches a point where "the total amount in the Unemployment Compensation Trust Fund falls below four times the amount of contributions paid on or before the cut-off date * * * for the preceding calendar year, or below 60% of the contributions so paid for such calendar year;" and defendants allege that a correct statement of the law in this respect is as follows:

As soon as practicable after June 30th of each year, credits are assigned to qualified employers provided:

(1) That there exists in the Unemployment Compensation Trust Fund a "surplus" which consists of the lesser of (a) that amount by which the moneys in said Fund, as of the cut-off date exceed four times the amount of contributions paid on or before the cut-off date with respect to the payrolls reported by all employers on or before said cut-off date for the preceding calendar year, or (b) an amount equal to 60% of the contributions so paid for the preceding calendar year; and

(2) That the amount of such surplus is at least 10% of the amount of contributions paid on the payrolls reported by all employers on or before the cut-off date for the preceding calendar year.

7. Answering Paragraph VII of the complaint, defendants deny the allegations contained therein, and allege that the correct definition of "contributions," as contained in §51-5-1 ACLA 1949, is as follows:

“As used in this Act, unless the context clearly requires otherwise—‘contributions’ mean the money payments to the Alaska unemployment compensation fund required by this Act.”

8. Answering Paragraph VIII of the complaint, defendants admit the allegations contained therein with the exception of the assertion that “defendants established a ‘cut-off’ date * * *;” and defendants allege, in this respect, that the “cut-off” date above referred to is established by law (§51-5-5(c) (1) (D) ACLA 1949) and is not established by defendants.

9. Answering Paragraph IX of the complaint, defendants deny the allegations contained therein and allege as follows: (a) the “cut-off” date is established by law, and not by defendants; (b) the amount of \$9,397,006.93, which was the total amount in the Unemployment Compensation Trust Fund on March 15, 1950, is not the “surplus” as defined in the law; (c) the total contributions paid by all employers during the calendar year 1949, amounted to \$2,386,932.63; and (d) as of the cut-off date (March 15, 1950) no “surplus,” as that term is defined in the law, existed in the said Fund.

10. Answering Paragraph X of the complaint, defendants deny the allegations contained therein.

11. Answering Paragraph XI of the complaint, defendants admit the allegations contained therein.

12. Answering Paragraph XII of the complaint, defendants admit that no credits will be issued to

plaintiffs for the credit year beginning July 1, 1950, and that plaintiffs, for each quarter of said credit year, will be obliged to pay cash contributions which cannot be recovered or credited against future contributions due from them; but defendants deny all other allegations contained therein.

13. Answering Paragraph XIII of the complaint, defendants deny the allegations contained therein.

Second Defense

For a second and separate defense, defendants allege (a) That the total "contributions" paid for the calendar year 1949 amounted to \$2,386,932.63, and that this amount included not only cash but credits previously issued to qualified employers; and that based on this amount of contributions, no "surplus," as that term is defined in §51-5-5(c) (1) (G) ACLA 1949, existed in the Unemployment Compensation Trust Fund as of the cut-off date of March 15, 1950, and therefore no credits could be issued for the credit year beginning July 1, 1950.

(b) That the defendants' interpretation of "contributions" as including not only cash payments but also credits is reasonable and in conformity with the objective and purpose of the Alaska Employment Security Law.

(c) That the plaintiff's interpretation of "contributions" as including only cash payments, and not credits, would tend to defeat the purpose of the Alaska Employment Security Law and endanger the solvency of the Employment Compensation Fund, and is therefore incorrect.

Third Defense

For a third and separate defense, defendants allege that under the provisions of the Alaska Employment Security Law, experience rating credits for the credit year July 1, 1948, to June 30, 1949, were issued to plaintiff, New England Fish Company, in the amount of \$15,371.38; that this amount was based on defendants' interpretation of the word "contributions" as used in the definition of the word "surplus" (§51-5-5(c) (1) (G) ACLA 1949), as including not only cash payments but experience rating credits, and that if plaintiffs' interpretation of "contributions" as including only cash payments had been followed by defendants, the amount of credits to be issued to plaintiff, New England Fish Company, would have been \$15,465.78. That for the credit year July 1, 1949, to June 30, 1950, experience rating credits were issued to plaintiff, New England Fish Company, in the amount of \$17,-645.82; that this amount was based upon defendants' interpretation of "contributions" as mentioned above, and that if plaintiffs' interpretation had been followed, the amount of credits to be issued would have been \$10,724.28.

That for the credit year July 1, 1948, to June 30, 1949, experience rating credits in the amount of \$4,025.30, were issued to plaintiff, Wards Cove Packing Company; that this amount of credits was based upon defendants' interpretation of "contributions" as mentioned above; that if plaintiffs' interpretation of "contributions" had been followed, the amount of credits to be issued would have been

\$4,048.56. That for the credit year July 1, 1949, to June 30, 1950, plaintiff, Wards Cove Packing Company, obtained credits in the amount of \$15,670.81; that this amount was based upon defendants' interpretation of "contributions" as mentioned above; that if plaintiffs' interpretation had been followed, credits in the amount of \$6,445.07, would be all that would have been issued for that credit year.

That since plaintiffs have in past years accepted credits issued according to defendants' interpretation of "contributions" as referred to above, they cannot now maintain that defendants' interpretation is erroneous.

Wherefore, defendants having fully answered the complaint herein, pray for an order denying plaintiffs' application for a mandatory injunction, and for an order dismissing the complaint.

J. GERALD WILLIAMS,

Attorney General of Alaska,

/s/ JOHN H. DIMOND,

Assistant Attorney General,

Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed November 1, 1950.

[Title of District Court and Cause.]

Civil Cause No. 6377-A

ANSWER TO PETITION

To the petition for review herein, defendants above named, through their attorneys, answer as follows, to wit:

First Defense

1. Answering Paragraph I of the petition, defendants admit the allegations contained therein.

2. Answering Paragraph II of the petition, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

3. Answering Paragraph III of the petition, defendants admit the allegations contained therein.

4. Answering Paragraph IV of the petition, defendants admit the allegations contained therein.

5. Answering Paragraph V of the petition, defendants admit the allegations contained therein.

6. Answering Paragraph VI of the petition, defendants admit the allegations contained therein with the following exceptions:

Defendants deny the interpretation of the Employment Security Law, as alleged by plaintiffs and petitioners, to the effect that credits are assigned to qualified employers until the amount of cash contribution required to be paid reaches a point where "the total amount in the Unemployment Compens-

sation Trust Fund falls below four times the amount of contributions paid on or before the cut-off date * * * for the preceding calendar year, or below 60% of the contributions so paid for such calendar year;" and defendants allege that a correct statement of the law in this respect is as follows:

As soon as practicable after June 30th of each year, credits are assigned to qualified employers provided:

(1) That there exists in the Unemployment Compensation Trust Fund a "surplus" which consists of the lesser of (a) that amount by which the moneys in said Fund, as of the cut-off date, exceed four times the amount of contributions paid on or before the cut-off date with respect to the payrolls reported by all employers on or before said cut-off date for the preceding calendar year, or (b) an amount equal to 60% of the contributions so paid for the preceding calendar year; and

(2) That the amount of such surplus is at least 10% of the amount of contributions paid on the payrolls reported by all employers on or before the cut-off date for the preceding calendar year.

7. Answering Paragraph VII of the petition, defendants deny the allegations contained therein, and allege that the correct definition of "contributions," as contained in §51-5-1 ACLA, 1949, is as follows:

"As used in this Act, unless the context clearly requires otherwise—'contributions' mean the money payments to the Alaska unemployment compensation fund required by this Act."

8. Answering Paragraph VIII of the petition, defendants admit the allegations contained therein with the exception of the assertion that "defendants established a 'cut-off' date * * *;" and defendants allege, in this respect, that the "cut-off" date above referred to is established by law (§51-5-5(c) (1) (D) ACLA 1949) and is not established by defendants.

9. Answering Paragraph IX of the petition, defendants admit that as of the cut-off date, March 15, 1950, there was in the trust fund \$9,397,006.93, but defendants deny each and every other allegation contained therein. Defendants allege that the total contributions paid by all employers during the calendar year 1949, amount to \$2,386,932.63, and that as of the cut-off date, March 15, 1950, no "surplus," as that term is defined in the law, existed in the said Fund.

10. Answering Paragraph X of the petition, defendants deny the allegations contained therein.

11. Answering Paragraph XI of the petition, defendants admit the allegations contained therein.

12. Answering Paragraph XII of the petition, defendants admit the allegations contained therein.

13. Answering Paragraph XIII of the petition, defendants admit the allegations contained therein.

14. Answering Paragraph XIV of the petition, defendants admit the allegations contained therein.

15. Answering Paragraph XV of the petition, defendants admit the allegations contained therein.

16. Answering Paragraph XVI of the petition, defendants admit the allegations contained therein with the exception of those facts alleged in plaintiffs and petitioners' exhibits G and H, which plaintiffs and petitioners have re-alleged in their petition for review and which defendants have denied in this answer to said petition.

17. Answering Paragraph XVII of the petition, defendants admit the allegations contained therein.

18. Answering Paragraph XVIII of the petition, defendants admit the allegations contained therein.

19. Answering Paragraph XIX of the petition, defendants admit that in ascertaining the fact that no surplus existed in the Unemployment Compensation Trust Fund as of March 15, 1950, defendants included in the term "contributions" not only cash payments made for the calendar year 1949, but also experience rating credits which had been issued for said year; but defendants deny each and every other allegation contained in said Paragraph XIX.

Second Defense

For a second and separate defense, defendants allege (a) That the total "contributions" paid for the calendar year 1949, amounted to \$2,386,932.63, and that this amount included not only cash but credits previously issued to qualified employers; and that based on this amount of contributions, no "surplus," as that term is defined in §51-5-5(c) (1) (G) ACLA 1949, existed in the Unemployment Compensation Trust Fund as of the cut-off date of March 15, 1950, and therefore no credits could be issued for the credit year beginning July 1, 1950.

(b) That the defendants' interpretation of "contributions" as including not only cash payments but also credits is reasonable and in conformity with the objective and purpose of the Alaska Employment Security Law.

(c) That the plaintiffs and petitioner's interpretation of "contributions" as including only cash payments, and not credits, would tend to defeat the purpose of the Alaska Employment Security Law and endanger the solvency of the Unemployment Compensation Fund, and is therefore incorrect.

Third Defense

For a third and separate defense, defendants allege that under the provisions of the Alaska Employment Security Law, experience rating credits for the credit year July 1, 1948, to June 30, 1949, were issued to plaintiff and petitioner, New England Fish Company, in the amount of \$15,371.38; that this amount was based on defendants' interpretation of the word "contributions" as used in the definition of the word "surplus" (§51-5-5(c) (1) (G) ACLA 1949), as including not only cash payments but experience rating credits, and that if plaintiffs and petitioners' interpretation of "contributions" as including only cash payments had been followed by defendants, the amount of credits to be issued to plaintiff and petitioner, New England Fish Company, would have been \$15,465.78. That for the credit year July 1, 1949, to June 30, 1950, experience rating credits were issued to plaintiff and petitioner, New England Fish Company, in

the amount of \$17,645.82; that this amount was based upon defendants' interpretation of "contributions" as mentioned above, and that if plaintiffs and petitioners' interpretation had been followed, the amount of credits to be issued would have been \$10,724.28.

That for the credit year July 1, 1948, to June 30, 1949, experience rating credits in the amount of \$4,025.30, were issued to plaintiff and petitioner, Wards Cove Packing Company; that this amount of credits was based upon defendants' interpretation of "contributions" as mentioned above; that if plaintiffs and petitioners' interpretation of "contributions" had been followed, the amount of credits to be issued would have been \$4,048.56. That for the credit year July 1, 1949, to June 30, 1950, plaintiff and petitioner, Wards Cove Packing Company, obtained credits in the amount of \$15,670.81; that this amount was based upon defendants' interpretation of "contributions" as mentioned above; that if plaintiffs and petitioners' interpretation had been followed, credits in the amount of \$6,445.07, would be all that would have been issued for that credit year.

That since plaintiffs and petitioners have in past years accepted credits issued according to defendants' interpretation of "contributions" as referred to above, they cannot now maintain that defendants' interpretation is erroneous.

Wherefore, defendants having fully answered the petition for review herein, pray that the orders and

decisions of the Employment Security Commission of Alaska, dated October 30, 1950, be affirmed and that plaintiffs and petitioners' petition be dismissed.

/s/ J. GERALD WILLIAMS,
Attorney General of Alaska,

/s/ JOHN H. DIMOND,
Assistant Attorney General,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed November 3, 1950.

[Title of District Court and Cause.]

Civil Cause No. 6377-A

STIPULATION

It is hereby stipulated and agreed between New England Fish Company, a corporation, and Wards Cove Packing Company, a corporation, the above-named plaintiffs and petitioners, through their attorney, H. L. Faulkner, and the above-named defendants, through their attorney, John H. Dimond, Assistant Attorney General of Alaska, that the above-named plaintiffs and petitioners' Exhibits A, B, C, D, E, F, G and H, attached to and made a part of plaintiffs and petitioners' Petition for Review of Decision of Employment Security Commission of Alaska on file herein constitute all documents and papers required by the provisions of §51-5-7(i)

ACLA 1949, to be certified and filed with the court by the defendants, and that said exhibits may be considered as having been so certified and filed; that plaintiffs and petitioners' Exhibits I and J attached to and made a part of their petition mentioned above constitute the defendants' findings of fact and decision in this case, and that the same may be considered as having been certified and filed with the court pursuant to the provisions of the statute hereinabove referred to.

Dated at Juneau, Alaska, this 3rd day of November, 1950.

/s/ H. L. FAULKNER,

FAULKNER, BANFIELD &

BOOCHEVER,

Attorneys for Plaintiffs and
Petitioners.

/s/ JOHN H. DIMOND,

Assistant Attorney General of Alaska, Attorney
for Defendants.

[Endorsed]: Filed November 3, 1950.

In the District Court for the Territory of Alaska,
Division Number One at Juneau
No. 6377-A.

NEW ENGLAND FISH COMPANY, a Corpora-
tion, et al.,

Plaintiffs,

vs.

GEORGE VAARA, et al.,

Defendants.

No. 6356-A.

NEW ENGLAND FISH COMPANY, a Corpora-
tion, et al.,

Plaintiffs,

vs.

GEORGE VAARA, et al.,

Defendants.

ORDER OF CONSOLIDATION

It appearing to the Court that the issues of law involved in the two above-captioned cases, No. 6356-A and No. 6377-A, are the same, and that Cause No. 6377-A is set down for hearing on the 13th day of November, 1950, and that the facts to be developed in the evidence and the matters of law to be argued are the same,

Now, on motion of H. L. Faulkner, attorney for Plaintiffs, It Is Hereby Ordered that the two above-captioned causes, No. 6356-A and No. 6377-A, be consolidated for trial and argument.

Done in open Court this 13th day of November, 1950.

/s/ GEORGE W. FOLTA,
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed November 13, 1950.

[Title of District Court and Cause.]

Nos. 6377-A and 6356-A

OPINION

FAULKNER, BANFIELD & BOOCHEVER,
Attorneys for Plaintiffs and Petitioners.

J. GERALD WILLIAMS,
Attorney General of Alaska, and

JOHN H. DIMOND,
Assistant Attorney General,
For Defendants.

The Alaska Unemployment Compensation law, Section 51-5-1 to 20, A.C.L.A. 1949, requires employers to contribute to the unemployment compensation trust fund 2.7% of the payrolls for each quarter, less such experience rating credits as they may be entitled to while there exists in the trust fund a surplus, which, as defined by Section 51-5-5 (G), is the lesser of (1) that amount by which the moneys in the trust fund, as of the cut-off date, exceed four times the amount of contributions paid on

or before the cut-off date with respect to the payrolls reported by all employers on or before said cut-off date for the preceding calendar year; or, (sic) (2) an amount equal to 60% of the contributions so paid for the preceding calendar year. It is further provided that the surplus must amount is at least 10% of the amount of the contributions paid on the payrolls reported by all employers on or before the cut-off date for the preceding calendar year. In other words, the surplus which is distributable in credits is the excess over either (1) the product of four times the previous year's contributions or (2) 60% of the total contributions for the preceding year, whichever is the lesser, provided that such excess in either case equals at least 10% of such contributions.

Plaintiffs allege that on the cut-off date fixed by the defendants, March 15, 1950, there was \$9,397,-006.93 in the trust fund and \$1,370,519.14 in contributions, resulting in not only an excess of \$3,914,930.30 over the product of four times the contributions, but also in an amount which greatly exceeded 60% of the contributions, the minima established by the act; that, although plaintiffs requested that the order fixing the cut-off date be vacated and the plaintiffs given the credits to which they would be entitled for the third and fourth quarters of 1950, the request was denied and plaintiffs were required to make full payment of 2.7% of their payrolls for the third quarter.

Plaintiffs further allege that in making the computation of the surplus in the trust fund, the de-

defendants erroneously added to the contributions paid the amount of credits and multiplied that sum, instead of the total of all contributions, by four, thereby rendering unavailable for distribution as credits the sum of \$3,914,930.37 for the year commencing July 1, 1950; and plaintiffs pray that defendants be required to recompute the aforesaid surplus in accordance with the formula prescribed by Chapter 74 S.L.A., 1947, Section 51-5-5 (G) A.C.L.A. 1949, and distribute the surplus by way of credits.

It is clear, therefore, that the question which is decisive of this controversy is as to the meaning of the term "surplus" as used in the act, which in turn depends upon the meaning to be accorded the term "contributions paid." The plaintiffs contend that the surplus consists exclusively of cash contributions paid into the fund of all the employers for the preceding calendar year, whereas the defendants contend that both cash and credits constitute "contributions" in the determination of surplus. Since contributions for the period involved total \$1,370,519.14 and credits \$1,016,413.49, it is manifest that if the two are added to make \$2,386,932.63, under defendants' theory there would be no distributable surplus, whereas under the plaintiffs' theory \$822,311.48 would be available for credits for the year beginning July 1, 1950, and the amount of contributions required to be paid correspondingly reduced. Section 51-5-1 provides that:

"As used in this Act, unless the context clearly requires otherwise——

“(d) ‘Contributions’ means the money payments to the Alaska unemployment compensation fund required by this Act.”

and Section 51-5-5 provides that:

“(G) ‘Surplus’ means the lesser of:

“(1) That amount by which the moneys in the Unemployment Compensation Trust Fund, as of the cut-off date, exceed four times the amount of contributions paid on or before the cut-off date with respect to the payrolls reported by all employers on or before said cut-off date for the preceding calendar year, or

“(2) An amount equal to sixty per cent 60% of the contributions so paid for the preceding calendar year. No portion of the surplus shall be credited to any employer unless the amount of the surplus is at least ten per cent (10%) of the amount of the contributions paid on the payrolls reported by all employers on or before the cut-off date for the preceding calendar year,” (emphasis supplied).

From the foregoing, it appears reasonably clear that the language employed leaves no room for construction because there is nothing to construe. But the defendants argue that in view of the declared objective of the act in the preamble to Chapter 4 E.S.L.A. 1937, to relieve economic insecurity due to unemployment by encouraging employers to provide more stable employment and by providing for a systematic accumulation of funds during good times for use in poor times and the fact that under plaintiffs’ theory fluctuations in the surplus with

consequences never intended by the legislature, would result, the defendants' view should be adopted.

There is much plausibility and force to the argument that contributions should comprise both cash payments and credits if fluctuations in the fund are to be avoided and some degree of constancy attained, but in demonstrating, in such convincing fashion, the desirability of such a result and of measuring the benefit potential by the payroll totals, the defendants have also demonstrated that the legislature failed to use language expressive of the intent which defendants urge upon the Court, despite the fact that it would have been easy to provide that surplus should include credits given as well as contributions paid. Indeed, it is inconceivable that the legislature left the language stand in the belief that "contributions paid" and "money payments" included credits, for in no sense could it be said that such credits are "paid." This is not a case of an unhappy choice of words of doubtful or vague meaning or the use of terms of art, but rather a case in which the meaning of the language used is clear and certain. Such an omission can not be supplied by the Court under the guise of construction without encroaching upon the legislative function.

Nor does the clause "unless the context clearly require otherwise" in Section 51-5-1 warrant a different conclusion. Defendants' argument on this point apparently proceeds on the assumption that "context" is to be construed as coterminous with

the text of the act, but I am inclined to believe that it is the immediate rather than the remote company in which the words are found by which their meaning must be judged. There is nothing in the context of paragraph (d) of Section 51-5-1 defining "contributions" as money payments, or in paragraph (G) of Section 51-5-5, defining surplus as consisting of "contributions paid," which can be said to clearly require that the definition of these terms be enlarged to include credits.

The case, then as I see it, is one in which the Commission has attempted to supply an obvious omission by administrative construction in order to give the act the effect which it undoubtedly should have. Laudable as this may be, however, such power has not been lodged in the Commission or the Court. It is exclusively a legislative function on which no encroachment can be made by the judicial or executive branches.

In my opinion the doctrine of estoppel urged by the defendants is not applicable to a situation such as the one here dealt with.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed December 27, 1950.

[Title of District Court and Cause.]

Civil Causes No. 6356-A and No. 6377-A

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled Cause No. 6356-A and Cause No. 6377-A were consolidated for the purpose of hearing, by order of the Court entered on November 13, 1950, and they were heard together on that date, and evidence having been adduced on the part of the above-named defendants and argument of counsel having been made in open court on that date, and Faulkner, Banfield & Boochever, counsel for plaintiffs and petitioners, and J. Gerald Williams, Attorney General of Alaska, and John Dimond, Assistant Attorney General of Alaska, counsel for the defendants, thereafter having filed briefs on behalf of the respective parties and the court having taken the matter under advisement, and thereafter having on December 27, 1950, rendered its opinion,

Now Thereafter the court does make the following:

Findings of Fact

I.

That the plaintiff and petitioner New England Fish Company is a corporation organized under the laws of the State of Maine, and plaintiff and petitioner Wards Cove Packing Company is a corporation organized and existing under the laws of Alaska, and that both corporations are and were at

all times mentioned herein qualified to do business in the Territory of Alaska, and they were and are now employers of labor and contributors to the Alaska Unemployment Compensation Fund hereinafter mentioned.

II.

That the plaintiff and petitioner New England Fish Company and the plaintiff and petitioner Wards Cove Packing Company are now and have been for many years engaged in the business of catching, purchasing, canning, freezing and shipping fish products in Alaska, and the annual payroll of the New England Fish Company is in excess of \$735,000.00 and the annual payroll of the Wards Cove Packing Company is in excess of \$190,000.00, and both corporations are now and have been at all times mentioned in the pleadings subject to all the provisions of the laws of the Territory of Alaska, including the law known and designated as the Alaska Unemployment Compensation law.

III.

That defendants George Vaara, Anthony Zorich and Ralph J. Rivers constitute the Employment Security Commission of Alaska under the provisions of Chapter 4, Session Laws of the Extraordinary Session of the Alaska Legislature of 1937, as amended (Sections 51-5-1 to 51-5-20 inclusive, ACLA 1949) and the defendant R. E. Sheldon is the Director and chief executive of the Employment Security Commission of Alaska, and he was such at all times mentioned herein, and the defendants are charged with the duty of administering the Alaska Unemployment Compensation law as found

in Chapter 4, Session Laws of the Extraordinary Session of the Alaska Legislature of 1937, as amended by Chapters 1 and 51, Session Laws of Alaska, 1939, and Chapter 40 of the Laws of Alaska of 1941, Chapters 8, 20 and 50 of the Laws of Alaska of 1945, Chapter 32 of the Laws of Alaska of 1946, Chapter 74 of the Laws of Alaska of 1947, and Chapter 112, Laws of Alaska of 1949, and all other amendments thereof, which laws are found in Sections 51-5-1 to 51-5-20 inclusive, ACLA 1949, and that the defendants have been duly appointed and qualified.

IV.

That Section 51-5-5 ACLA, 1949, as amended by Chapter 112, Session Laws of 1949, requires plaintiffs, and all other employers in Alaska, to pay into the Alaska Unemployment Compensation fund 2.7 per cent of their payrolls for each quarter year, and Chapter 74, Session Laws of Alaska 1947 (Section 51-5-5 ACLA 1949) sets up certain credits against these payments according to a formula therein contained, and it requires the defendants to compute the credits and notify the employers, including the plaintiffs, of the amount of the credits, and to give all employers subject to the provisions of the law, including plaintiffs, the benefit of the credit due, thereby reducing the amount of cash or money contribution required to be paid, until the total amount in the Unemployment Compensation Trust Fund falls below four times the amount of contributions paid on or before the "cut-off" date, hereinafter

mentioned, for the preceding calendar year, or below 60% of the contributions so paid for such calendar year.

V.

That "contribution" is defined in the law as "money payments to the Alaska Unemployment Compensation Fund required by this Act" unless the context of the act "clearly requires otherwise" (Section 51-5-1 ACLA 1949).

VI.

That the defendants established a "cut-off" date as it is defined in the law, as of March 15, 1950, and notified all employers, including plaintiffs, that no more credits would be granted after July 1, 1950, and that none could be used after that date under the provisions of Chapter 74, Session Laws of Alaska, 1947 (Section 51-5-5 ACLA 1949), and the Commission issued a bulletin and order to that effect on April 28, 1950.

VII.

That at the "cut-off" date as established by defendants on March 15, 1950, there was in the Trust Fund the sum of \$9,397,006.93, and the total contributions of all employers during the preceding year amounted to \$1,370,519.14, so that at the "cut-off" date aforesaid the amount of surplus in the fund exceeded four times the contributions by \$3,914,930.37, and it greatly exceeded 60% of those contributions.

VIII.

That in computing the surplus required for the credit year beginning July 1, 1950, the defendants multiplied the contributions paid during the calendar year 1949 plus the credits given during that year to all employers by the figure 4. The total contributions paid by all employers during the year 1949 was \$1,370,519.14 and the total amount of credits given that year amounted to \$1,016,413.49. Four times these two amounts is \$9,547,730.52, and defendants used this figure in determining whether credits should be given to employers for the credit year beginning July 1, 1950, and since the amount in the Trust Fund as of March 15, 1950, the "cut-off" date, was \$9,397,006.93, the defendants cut off all credits to employers, including the plaintiffs and petitioners, for the credit year beginning July 1, 1950. That the law above mentioned defines "contributions" as "money payments," unless otherwise clearly required by the context, and the required surplus for the establishment of credit is four times the contributions paid during the preceding calendar year, with a provision that no credits may be granted in excess of 60% of the contributions paid during the preceding calendar year.

IX.

That had the defendants computed the required surplus in order to assign credits as four times the contributions paid in 1949, there would have been in the fund as of the "cut-off" date a surplus of \$3,914,930.36 applicable to future credits.

X.

That the Complaint in Cause No. 6356-A above mentioned was filed herein on October 9, 1950, and in that cause plaintiffs seek a mandatory injunction against defendants to require them to recompute the surplus and assign credits to plaintiffs and all others similarly situated in accordance with the provisions of the statute and to permit them to reduce the amount of cash contributions otherwise payable for the quarters ending September 30 and December 31, 1950, and March 31 and June 30, 1951, but before a hearing could be had in that cause contributions became due and payable to the defendants for the quarter ended September 30, 1950, and the plaintiffs and all others similarly situated, and all other employers in the Territory, were required for the September quarter, 1950, to pay 2.7% of their payrolls to the defendants to be covered into the Alaska Unemployment Compensation Fund, without any reduction for credits. Thereupon plaintiffs and others similarly situated paid the amounts demanded under protest and the plaintiff New England Fish Company paid 2.7% of its payroll for the September, 1950, quarter, and this amounted to \$14,092.10, and \$4,225.79 for the Wards Cove Packing Company.

XI.

That these payments hereinabove mentioned for the September, 1950, quarter were made within the time required by law and they were made under protest to the Commission with a petition for a refund in cash to the extent of the credits which

plaintiffs claimed should have been assigned to them, and thereupon plaintiffs, in endeavoring to have the credits assigned and to have a refund made to them to the extent of the credits for the September quarter of 1950, followed the administrative procedure provided by the Act and exhausted all their administrative remedies as set up in the petition in Cause No. 6377-A, and defendants declined and refused to make a recomputation of the surplus in the Unemployment Compensation Trust Fund, and declined and refused to assign plaintiffs and credits for the quarter ended September 30, 1950, and thereupon plaintiffs filed the petition herein in the above-entitled cause No. 6377-A, and that all and singular the allegations of that petition are true.

XII.

That there was in the Alaska Unemployment Compensation Trust Fund at the "cut-off" date on March 15, 1950, the sum of \$822,311.48 available for credits for the credit year beginning July 1, 1950.

XIII.

That plaintiffs brought these actions on behalf of themselves and all other employers similarly situated in the Territory of Alaska.

Based on the foregoing Findings of Fact, the Court does make the following:

CONCLUSIONS OF LAW

I.

That the computation of surplus in the Alaska Unemployment Compensation Trust Fund as made by the defendants was erroneous in that it included not only four times the contributions paid for 1949, but four times the credits assigned to plaintiffs and other employers for the calendar year.

II.

That in computing the surplus for the purpose of determining and assigning credits, the defendants should use only four times the contributions paid for the calendar year 1949 in determining the surplus and in determining the amount available for credits, which the law provides shall be for any credit year not more than 60% of the total contributions paid during the preceding calendar year, and defendants are required to compute the surplus and assign the credits on that basis.

III.

That the amounts paid by the plaintiffs New England Fish Company and Wards Cove Packing Company for the September quarter, 1950, are in excess of the amount required and should be reduced by the amount of the credits which should have been computed and assigned to the plaintiffs, and the excess amount paid for the September quarter of 1950 by the plaintiffs should be refunded to them, and defendants shall recompute the sur-

plus in the Alaska Unemployment Compensation Trust Fund as of the "cut-off" date of March 15, 1950, and in accordance with the Findings hereinabove made and in accordance with the law, and assign to the plaintiffs and all others similarly situated such credits as are due them under the formula prescribed in the law referred to hereinbefore and in accordance with their respective credit rating classifications.

It Is Ordered that judgment be entered accordingly and that the defendants be ordered to make the recomputation and the assignments of credits in accordance with the Findings and Conclusions herein made, for the credit year beginning July 1, 1950, and that they refund to the plaintiffs and all others similarly situated the amounts heretofore paid to the defendants by the plaintiffs and others similarly situated for the quarter ended September 30, 1950, to the extent of the credits which should have been allowed for the credit year beginning July 1, 1950, and that the defendants in a similar manner compute and assign credits for the three remaining quarters of the credit year beginning July 1, 1950.

Done in open court this 18th day of January, 1951.

/s/ GEORGE W. FOLTA,
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed January 18, 1951.

In the District Court for the District of Alaska,
Division Number One at Juneau

Civil Causes No. 6356-A and No. 6377-A

NEW ENGLAND FISH COMPANY, a Corpora-
tion, and WARDS COVE PACKING COM-
PANY, a Corporation, for Themselves and All
Others Similarly Situated,

Plaintiffs,

vs.

GEORGE VAARA, ANTHONY ZORICH,
RALPH J. RIVERS, as the Employment Se-
curity Commission of Alaska, and R. E.
SHELDON, Director and Chief Executive
Thereof,

Defendants.

JUDGMENT AND DECREE

This cause having come on regularly for trial before the Court on November 13, 1950, upon the complaint and petition of plaintiffs and petitioners in Causes No. 6356-A and No. 6377-A and the answers of the defendants to the complaint in No. 6356-A and the complaint and petition in No. 6377-A, and the two causes having been consolidated for hearing and trial by the order of the Court entered herein on November 13, 1950, and plaintiffs and petitioners being represented by Faulkner, Banfield & Boochever, of Juneau, Alaska, their attorneys, and the defendants being represented by their attorneys, J. Gerald Williams, Attorney General of Alaska, and John Dimond, Assistant At-

torney General of Alaska, and evidence having been adduced before the Court on behalf of the parties, and arguments having been made by respective counsel for plaintiffs, petitioners and defendants, and the cause having been submitted for judgment on that day, and the Court having taken the matter under advisement and having thereafter, on December 27, 1950, rendered its written opinion which was on that day filed with the Clerk of the Court, and the Court having made and filed herein on January 18, 1951, its findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed that the defendants above named, and their officers, agents, employees and successors, and each of them, be and they are hereby enjoined from collecting from the plaintiffs and from all others similarly situated who are subject to the Alaska Unemployment Compensation law contributions required to be paid under that law, as referred to in the pleadings and findings herein, for the credit year beginning July 1, 1950, and ending June 30, 1951, in excess of 2.7 per cent of their payrolls less the credits provided to be allowed employers under the provisions of Chapter 74 of the Session Laws of Alaska, 1947, as amended (Section 51-5-5, ACLA, 1949), which credits are to be computed according to the formula prescribed in the law, and by computing the surplus available for credits as four times the amount of contributions paid during the calendar year 1949, which contributions amounted to \$1,370,519.14, and that the defendants, their agents, officers, employees and successors, and each

of them, forthwith assign the plaintiffs and all other employers in Alaska credits against the payments required to be made into the fund for the credit year aforesaid equal to sixty per cent of \$1,370.-519.14, or a total of \$822,311.48; and

It Is Further Ordered and Decreed that, after the recomputation of the credits due in accordance with the Court's opinion and findings herein, the defendants, their agents, officers, employees and successors, and each of them, forthwith refund to the plaintiffs and to all others similarly situated all payments heretofore made and hereafter made during the credit year beginning July 1, 1950, and ending June 30, 1951, in excess of the cash contributions which would have been required and which are required by the computation of the surplus and the portion thereof available for credits, namely, \$822,311.48, for the credit year aforesaid, and that after recomputation and assignments of credits for the credit year aforesaid shall have been made, the defendants, their agents, officers, employees and successors, and each of them, assign to the plaintiffs and to all others similarly situated the portions of the surplus available for credits, namely, \$822,311.48, in accordance with their respective classifications under the law and according to the opinion and findings of this Court.

Done in open court this 18th day of January, 1951.

/s/ GEORGE W. FOLTA,

Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed January 18, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above-named defendants hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree entered in this action on January 18, 1951.

J. GERALD WILLIAMS,
Attorney General of Alaska.

/s/ JOHN H. DIMOND,
Assistant Attorney General, Juneau, Alaska, Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed February 14, 1951.

[Title of District Court and Cause.]

No. 6377-A

STATEMENT OF POINTS TO BE RELIED ON BY APPELLANTS

The appellants, defendants above named, propose on their appeal to the United States Court of Appeals for the Ninth Circuit, to rely upon the following points as error:

I.

The court erred in holding that the computation made by appellants, from which it was determined that no surplus, distributable for experience rating credits, existed in the Alaska Unemployment Compensation Trust Fund as of March 15, 1950, was

erroneous in that such computation was made on the basis of "contributions," meaning not merely cash payments but the sum of such cash payments and experience rating credits.

II.

The court erred in finding that for the calendar year 1949 total contributions from all employers in the Territory amounted to \$1,370,519.14, that on March 15, 1949, there existed in the Alaska Unemployment Compensation Trust Fund a surplus which exceeded four times such contributions by \$3,914,930.37, and that on said date there was in the Fund \$822,311.48 available for distribution as experience rating credits for the credit year July 1, 1950-June 30, 1951.

This was error since the total contributions paid for 1949 amounted, not to \$1,370,519.14, which is merely the amount of cash payments made for that year, but to \$2,386,932.63, which is the sum of cash payments and experience rating credits for such year. The total amount of money in the Fund, i.e., \$9,397,006.93, thus did not exceed four times the total contributions for 1949, and consequently no surplus existed in the Fund to be distributed as experience rating credits for the year July 1, 1950-June 30, 1951.

III.

The court erred in holding that the appellees were not estopped from questioning appellants' determination of the meaning of "contributions" as that word is used in the definition of "surplus" in the

Alaska Employment Security Law, Section 51-5-5 (c)(1)(G), Alaska Compiled Laws Annotated, 1949.

This was error because appellees in previous years had accepted appellants' construction of the law in such respect, and by reason of such acquiescence received, for the credit year July 1, 1949-June 30, 1950, a greater amount of experience rating credits than they would have received had their interpretation of "contributions," as meaning only cash payments, been adopted and followed by appellants.

IV.

The court erred in entering judgment and decree in favor of appellees, and in ordering appellants to recompute the surplus in the Alaska Unemployment Compensation Trust Fund as of March 15, 1950, to assign experience rating credits to appellees and all others similarly situated for the credit year July 1, 1950-June 30, 1951, and to make refunds to appellees and all others similarly situated of cash contributions made by them for the said credit year in excess of the cash contributions which would be required after experience rating credits in the amount of \$822,311.48 have been issued.

Dated at Juneau, Alaska, this 15th day of February, 1951.

J. GERALD WILLIAMS,

Attorney General of Alaska.

/s/ JOHN H. DIMOND,

Assistant Attorney General, Attorneys for Defendants-Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed February 16, 1951.

[Title of District Court and Cause.]

No. 6377-A

STIPULATION RE PRINTING OF RECORD

It is hereby stipulated and agreed by and between Faulkner, Banfield and Boochever, attorneys for plaintiffs above named, and John H. Dimond, Assistant Attorney General of Alaska, one of the attorneys for the above-named defendants, that in printing the papers and records to be used in the hearing on appeal in the above-entitled cause before the United States Court of Appeals for the Ninth Circuit, the title of the court and cause in full shall be omitted from all papers except on the first page of the record, and that there shall be inserted in place of the title on all papers used as part of the record the words "Title of District Court and Cause"; also that all endorsements on all papers used as a part of the record may be omitted except the clerk's filing marks and admissions of service.

Dated at Juneau, Alaska, this 15th day of February, 1951.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ H. L. FAULKNER,

Attorneys for Plaintiffs.

/s/ JOHN H. DIMOND,

Assistant Attorney General, Attorney for Defendants.

[Endorsed]: Filed February 16, 1951.

[Title of District Court and Cause.]

No. 6377-A

DESIGNATION OF PORTIONS OF RECORD
AND PROCEEDINGS TO BE INCLUDED
IN RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in the above-entitled cause, and to include in such transcript of record the following papers and records which the above-named defendants-appellants designate as those portions of the record and proceedings herein which they deem should be contained in the record on appeal of this cause:

1. Petition for review of decision of Employment Security Commission of Alaska.
2. Plaintiffs' Exhibits Nos. A, B, C, D, E, F, G, H, I, and J attached to Petition.
3. Answer to petition.
4. Stipulation dated October 31, 1950.
5. Stipulation dated November 3, 1950.
6. Reporter's transcript of record.
7. Plaintiffs' Exhibit No. 1.
8. That portion of defendants' Exhibit A, the New York State Unemployment Insurance Law, designated therein as "Section 577(d)."
9. Defendants' Exhibit B.
10. Defendants' Exhibit C.

11. Opinion.
12. Findings of fact and conclusions of law.
13. Judgment and decree.
14. Notice of appeal.
15. Statement of points relied on by appellant.
16. Stipulation re printing of record.
17. This designation of portions of record and proceedings to be included in the record on appeal.

Dated at Juneau, Alaska, this 15th day of February, 1951.

J. GERALD WILLIAMS,
Attorney General of Alaska.

/s/ JOHN H. DIMOND,
Assistant Attorney General, Attorneys for Defendants-Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed February 16, 1951.

[Title of District Court and Cause.]

No. 6356-A and No. 6377-A

COUNTER PRAECIPE AND DESIGNATION
OF PORTIONS OF RECORD AND PRO-
CEEDINGS REQUESTED BY PLAIN-
TIFFS AND APPELLEES TO BE
INCLUDED IN RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

In the preparation of the transcript of record to be filed in the United States Court of Appeals for the Ninth Circuit pursuant to an appeal being taken by the above-named defendants, you are requested to include in the transcript of record, in addition to the papers and records requested by the defendants-appellants, the following:

1. Complaint in Cause No. 6356-A.
2. Answer to Complaint in Cause No. 6356-A.
3. Order dated November 13, 1950, consolidating Causes Nos. 6356-A and 6377-A.
4. This Praecipe and Designation of Portions of Record and Proceedings Requested by Plaintiffs-Appellees.

Dated at Juneau, Alaska, this 16th day of February, 1951.

/s/ H. L. FAULKNER,

Attorney for Plaintiffs-
Appellees.

Receipt of copy acknowledged.

[Endorsed]: Filed February 16, 1951.

In the District Court for the Territory of Alaska,
Division Number One, at Juneau
No. 6356-A and No. 6377-A

NEW ENGLAND FISH COMPANY, a Corpora-
tion, and WARDS COVE PACKING COM-
PANY, a Corporation, for Themselves and All
Others Similarly Situated,

Plaintiffs,

vs.

GEORGE VAARA, ANTHONY ZORICH,
RALPH J. RIVERS, as the Employment Se-
curity Commission of Alaska, and R. E.
SHELDON, Director and Chief Executive
Thereof,

Defendants.

REPORTER'S TRANSCRIPT OF RECORD

Be It Remembered, that on the 13th day of No-
vember, 1950, at 9:30 o'clock a.m., at Juneau,
Alaska, the above-entitled cause came on for hear-
ing, the Honorable George W. Folta, United States
District Judge, presiding; the plaintiffs appearing
by H. L. Faulkner, of their attorneys; the defend-
ants appearing by John H. Dimond, Assistant At-
torney General of the Territory of Alaska;

Whereupon, the following occurred:

The Court: I have familiarized myself with the
pleadings and the issues so, unless counsel have
something further to add to what the pleadings
reflect, we can go on.

Mr. Faulkner: I think, your Honor, the plead-

ings [1*] look more formidable than the issues of the case. I might say that this involves the interpretation of one or two words in the statute, what constitutes surplus. We have here a number of original letters and petitions and so on, but these are all attached to the complaint and admitted, so I don't think it is necessary to admit them in evidence. We have no evidence, and that is all as far as I am concerned. So, if Mr. Dimond has any evidence——

Mr. Dimond: I have a couple of witnesses.

The Court: You may call them then.

JOHN T. McLAUGHLIN

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Dimond:

Q. Please state your name.

A. John T. McLaughlin.

Q. What is your occupation?

A. Director of the Unemployment Insurance Division of the Employment Security Commission.

Q. How long have you been in that position?

A. Since March, 1947.

Q. Did you work on the drafting of the experience rating, 1947 amendment to the Employment Security Law? A. Yes, I did. [2]

Q. What part did you have with respect to the drafting of that statute?

A. I was directed by Mr. Sheldon, the Executive

*Page numbering appearing at foot of page of original Certified Transcript of Record.

(Testimony of John T. McLaughlin.)

Director, to continue on with our study of experience rating and complete the study with the thought of having a bill ready for presentation in the 1947 Legislature.

Q. Was this experience rating law originated in your office or was it modeled after some other state enactment along the same lines?

A. In seeking an employer rating system that would work favorably in the Territory of Alaska, we ran onto the payroll decline system used in New York.

Q. You have answered the question?

A. Yes. That we followed the study made in New York State on payroll decline.

Q. Did you consider the New York definition of surplus as respects the trust fund, adequacy of the fund?

A. We considered the New York plan on reserve and surplus. The preliminary study in New York State, the whole study was based on how much money is necessary for sufficient reserve based on the preceding year's taxable wages in as much as the taxable wages represent the benefit potential, and it was declared that 10%, or rather 10.8% of the preceding year's taxable wages was sufficient. The preliminary study carried this figure, 10.8 of the preceding year's [3] taxable wages. Later, when the law was drafted, that swung from the usage of 10.8 of the preceding year's taxable wages to four times the contribution amount, which in effect is

(Testimony of John T. McLaughlin.)

the same as 2.8, the contribution being 2.7 of the taxable wages.

The Court: Am I to understand that whatever formula they used to start with ended and they used this other?

A. No, your Honor. The system has not been changed since it was first passed by the Territorial Legislature.

The Court: I am speaking of the New York system. I thought that is what you were talking about in your last answer.

A. We used that system, but, since the question is on surplus and on reserve, I wanted to bring out that point.

The Court: When you say they later did so and so, do you mean the Legislature or New York?

A. It was New York; yes.

Mr. Dimond: At this time, if the Court please, I would like to offer in evidence the New York State law; I have marked the place where surplus is defined in the section of the statute.

The Court: Am I to understand that your testimony will show that it was adopted here?

Mr. Dimond: No.

Mr. Faulkner: If the Court please, we don't want to [4] object, but for the purpose of shortening the record I don't think the testimony is relevant at all—what it is in New York.

The Court: If it was not adopted here, how is it relevant?

(Testimony of John T. McLaughlin.)

Mr. Faulkner: I think we are concerned only with the language of our own statute.

Mr. Dimond: My only thought is, your Honor, if the Alaska law was taken—of course I can't prove it was adopted word for word, but through testimony that the New York law was considered, and they drafted—and the reasonable inference on the interpretation of surplus, it is almost identical with the Alaska law and was adopted by the Legislature.

The Court: That sounds reasonable enough except that, as I understand the testimony, it hasn't been shown yet that that was adopted here.

Mr. Dimond: I don't think it was adopted.

Q. Was the New York law adopted?

A. Not in its entirety.

The Court: Was the part adopted that is involved in this controversy?

A. To a great extent it was. The payroll decline, reserve and surplus was adopted, your Honor.

Mr. Faulkner: I still think it is not competent because theories are not admissible to show what the law is. I mean the law is plain on its face. I think that is all we are [5] concerned with.

The Court: You mean this formula, if it can be called a formula, was based, or you took into consideration this payroll decline theory?

A. Yes, your Honor.

The Court: What is this payroll decline theory?

A. Employers are classified according to their annual decline in payrolls.

(Testimony of John T. McLaughlin.)

The Court: Is there necessarily a decline in payrolls?

A. No. Some cases increase, or the payroll is constant. However, if the payroll declines during a three-year period, it has the effect of placing the employer in a less favorable class than those who have a steady payroll or show an increase.

The Court: Well, then am I to understand that, so far as our statute is concerned, it is based on this theory of payroll decline, only without taking into account the payrolls of employers who increase or remain more or less stationary? How can this theory play an important part if it is only applied to employers whose payrolls decline? Are the employers involved in this controversy employers whose payrolls have declined?

Mr. Dimond: Well, your Honor, I think the experience rating theory is that those employers who have shown declines— [6] I mean, those who have not shown any declines get more credits than those who have shown more declines. I think they consider all employers and break it into percentage of declines. Those who show increases and no declines at all are in the top-favored class and get more surplus than those who don't for the same period of time.

The Court: Why is it necessary here at this time to emphasize payroll decline?

Mr. Dimond: There is no particular point in emphasizing that. As a matter of fact, it isn't essential I show the New York statute.

(Testimony of John T. McLaughlin.)

The Court: You can show something apparently irrelevant for the purpose of affording the Court an understanding. I am posing the questions at the outset, because it would seem to be somewhat irrelevant. Don't let me interfere with the manner you have of presenting your case, however.

Q. Mr. McLaughlin, at what time was the administrative interpretation of contributions, as contained in and used in this case, arrived at; that is, when did the administrator of your office determine the definition of surplus to mean total contributions; that is, cash plus credits?

A. The determination was made at the offset in figuring reserve, that it was the legislative intent to take four times the preceding year's contributions.

Q. Did you always interpret contributions as cash plus [7] credits? A. Yes, sir.

Q. There has never been any other interpretation made by your office? A. No.

The Court: When you say "cash plus credits," would that be the same as contributions plus credits?

Mr. Dimond: Not according to our theory.

The Court: What is the difference?

Mr. Dimond: Plaintiffs maintain contributions are only one thing; that is, cash. And defendants maintain that, since before you can have surplus, you must have four times the previous year's contributions. Then, if it meant cash plus credits—there are so many credits, if I may explain to the Court—then when they are obliged to make con-

(Testimony of John T. McLaughlin.)

tributions they may take credit instead of cash if they wish.

The Court: As you use contributions, is it looked upon as credit?

Mr. Dimond: Yes. The issue in this case is that the Employment Security Commission has considered credit as contribution and used them in figuring the surplus.

Q. Was there ever any discussion or argument within the Commission as to whether the plaintiff's or defendants' system should be used?

A. Yes. There was a lengthy discussion on the subject, and [8] several schedules were run, or studies were run, using cash only as contributions, using credit and cash as contributions, and the third study was a study using credit and cash with the subtraction of outstanding credit from the monies in the fund. Those three different systems were run as a study.

Q. And the final one determined, or was contributions interpreted to mean cash plus credits or total credits? A. Yes.

Q. And that has been adhered to from the first working of the statute? A. Yes.

Mr. Dimond: No further questions.

Cross-Examination

By Mr. Faulkner:

Q. John, the point in this case is the Commission has used cash and credits in computing the surplus required. A. Yes, sir.

(Testimony of John T. McLaughlin.)

Q. And we contend under the statute the money payments only should be used. Now, you say that you have in the past used the money payments plus the credits in computing the surplus. Now, you made a study of the results of that?

A. Yes, sir.

Q. As compared with using money payments only. Now, in the [9] answer here there are two examples set up for two years. Now, in those two years involved you show that by using the money payments, computing the surplus, multiplying by four, that one of the parties here would have been required to pay more money during one year by two hundred dollars on a payroll of seven hundred and some thousand, and the other would have been required to pay less. Is that so?

A. I believe that is so, Mr. Faulkner. However, Mr. Prather ran that study and, if it is your pleasure, I would rather have you question him.

Q. Yes. He will be on the stand later on?

A. Yes, sir.

Mr. Faulkner: That is all.

Mr. Dimond: That is all.

The Court: Well, now, what isn't clear to me is whether this decision of the Commission is something that is original or is it what has been done elsewhere under similar statutes.

Mr. Faulkner: There aren't any similar statutes, except the closest is Washington, but there are no court cases. I don't think the matter has ever been——

(Testimony of John T. McLaughlin.)

The Court: I thought it was patterned after the New York law.

Mr. Faulkner: I don't think so. [10]

Mr. Dimond: What I am attempting to show, your Honor, is that it is similar to the New York law so far as insurance, and they have a definition of surplus which is defined as a certain amount, if I may read it—" 'Surplus' means that amount by which the moneys in the fund as of the effective date, after subtracting the amount of credits," which we don't, "previously established under this section and outstanding as valid on such date, exceed the lesser of nine hundred million dollars or three and one-half times the amount of contributions payable on the payrolls reported by all employers." Our statute says that surplus is the amount by which the fund exceeds four times the amount of contributions payable.

Mr. Faulkner: "Paid." New York says, "payable"; ours is "paid."

Mr. Dimond: I have the report of the New York State Joint Committee in which the New York bills were considered, and this Committee stated that one of the most important things to be considered in their experience rating legislation was the solvency of the fund. If I might read it to the Court, the Committee said, "the solvency of the Fund must not be jeopardized. In this connection, the less advantageous economic conditions affecting employment in the postwar period should be taken into account in determining estimates of the Fund's

(Testimony of John T. McLaughlin.)

future solvency. The provisions of several bills [11] introduced in this year's Legislature meet this test by requiring a constant reserve of 10.8 per cent of the previous year's total taxable payroll (equivalent to four times the previous year's total contributions to the Fund).' If the reserve required is four times 2.7 per cent of the total payroll for the previous year, it is the same as cash plus credits because that will amount to total payroll. What we are trying to bring out in this case is that the Alaska interpretation must be the same as this.

Mr. Faulkner: Your Honor, I think that is an entirely different statute, and we don't have that in our statute. Now, we have the safeguard on the fund, that the fund, the surplus in the fund available for credit must be four times something. It is four times the contributions paid during the preceding year. Our point is we use this language, "contributions paid," and then go back in the original law and contributions is defined as money payments required by the act unless otherwise clearly required, as it doesn't in this case. I would like to ask Mr. McLaughlin another question or two. It might aid the Court.

Q. Mr. McLaughlin, the way this thing works, I think the Court understands it, but the law requires certain contributions which amount to a per cent of every employer's payroll. That is the fundamental thing; isn't it?

A. Fundamental; yes. [12]

Q. In 1947—that was originally 2.7?

(Testimony of John T. McLaughlin.)

A. Yes.

Q. In 1947 the Legislature passed an experience rating law. By that time you had considerable money in the fund?

A. Yes. It was considered we had sufficient money in the fund to distribute experience rating credits.

Q. We had some discussion about experience rating credits. After the law in 1947 was passed that provided instead of paying 2.7 into the fund there was certain credits given employers based on their payroll experience; is that right?

A. That is right.

Q. Now, those credits were based on the payroll decline; that is, you used that as a basis; that is, in other words, if a man's payroll declined a great deal from one year to another, he wouldn't get so much credit as if it were constant or increasing?

A. That is right.

Q. Payroll isn't exactly the same from one year to another in dollars and cents. There might be a little variation from one year to another, so you have six classes?

A. Yes.

Q. The highest is where the payroll doesn't decline more than ten per cent, and the next is thirty per cent and so on?

A. Yes. [13]

Q. That is the theory on which credits are based; that is the payroll decline?

A. The theory under which credits are distributed.

Q. Various other things enter into the formula

(Testimony of John T. McLaughlin.)

for computing the credits; you have a number of things you take into consideration in computing credits?

A. Yes; a regular schedule which results in the final computation of credits or percentage of credit for each of the different classes.

Q. Now, John, that is rather technical; I mean those various elements of the formula for computing an employer's credit, there are several elements that would have to be figured by one familiar with that particular thing?

A. Actually the schedule is not too complicated. We have six classes. The top class has the best experience. They have maintained their payroll. The theory of this experience rating is an attempt to, besides issuing credit, to stimulate the employer, to have constant employment in the Territory. Those in the top class deserve more credit, so they are given a certain weight which is above the weight in the lower class.

Q. In computing those credits you have to take into consideration various factors, one of which is payroll decline, if any, and the other is total payroll of all employers?

A. Yes. [14]

Q. And so when those various credits are computed they are computed by the Commission without any notice or participation by the employers?

A. Yes, sir.

Q. And the New England Fish Company and the Wards Cove Packing Company, the two petitioners in this case, have been in the top class, have they; or do you know?

A. I don't know.

(Testimony of John T. McLaughlin.)

Q. You don't know.

Mr. Faulkner: Off hand I think that is all.

The Court: Are the factors of the formula so ascertainable or determinable that any two people could come up with the same result so far as computation is concerned?

A. Yes, sir. If the formula is followed according to the law, any number of people would come up with the same result.

The Court: That is all.

Mr. Dimond: Has the Court ruled on my offer to admit the New York statute in evidence?

The Court: What do you claim for it?

Mr. Dimond: Well, I think the testimony shows that the New York statute was studied in connection with the drafting of the Alaska law, and at least some of the Alaska law is very similar, and the thinking of the New York committee on the intent of its law should have the inference as to showing [15] that the people who drafted the Alaska law were thinking along the same line, the fact that contributions have reference to the total, and I believe that is shown in the Joint Committee Report in 1945, and also the definition of surplus in the New York Statute itself.

The Court: Well, how would that thinking be affected by the difference, to which counsel called attention, between the two statutes?

Mr. Dimond: The essential things we are concerned with here today are not different. You might have some different wording in the statute, but the

essential things are the same. That is whether or not a surplus can be distributed, which means whether or not you have a certain required reserve in your fund depends upon the previous year's contributions. Now, New York, according to these that I want to introduce, shows whether or not you have a reserve large enough to distribute credits depends on the previous year's contributions, total payrolls, not cash payments alone. There is no essential difference. The New York statute does not define contributions as being money payments like Alaska law.

The Court: Is it a distinction without a difference, or is it a real difference that would call perhaps for a different interpretation?

Mr. Dimond: Plaintiffs say it is a difference. We think it is not. In the original law, unless the context is [16] otherwise, money payments were not issued for ten years. When the experience rating law was drafted that was left in. It wasn't changed as it possibly should have been. It was left in, and we submit and are trying to show on argument that the new experience rating law clearly means something else than cash if you interpret money as cash; credits. We have to rely on the fact that money does not always have definite significance. In view of the statute, the context of the law and legislative history, as I have attempted to show, in considering the New York law, that contributions mean something besides cash payments, it means total credits. In fact reserve relates to payments. You won't have that relating to payrolls if you just use cash contributions.

The Court: This is something perhaps besides the point involved. What would be the difference? Would it be substantial or just minor if one or the other theory prevailed here, or if the plaintiffs' theory——

Mr. Dimond: I am attempting to show, by an exhibit which will be identified by the next witness——

The Court: Then you needn't go into it. If any booklets or any of them tend to throw light that will be——

Mr. Faulkner: For the sake of the record I would like to renew my objection to these, but principally on the ground that it is more or less confusing; it confuses the issue. I have no objection to the introduction so the Court [17] can read it, but I think it confuses the issue here, and for that reason I object to it. I will afterwards point out to the Court the difference. We are concerned with the Alaska law. Even if the New York law was the same, it would not be binding on the Court. There are no court decisions of this anywhere.

Mr. Dimond: There aren't; I will admit that, your Honor.

The Court: If this were a jury trial with the possibility of confusing the jury, it would be formidable and I would give weight to it as having a tendency to confuse the jury, but, not having a jury, the objection will be overruled, and it may be admitted. Do you wish to have them lettered separately?

Mr. Dimond: I might say I only wish a certain portion.

The Court: You might specify it.

Mr. Faulkner: I would like the whole law if it is going in.

The Court: All the law?

Mr. Dimond: I offer this pamphlet, New York State Unemployment Insurance Law, Article 18 of the New York State Labor Law, as Amended, as Defendants' Exhibit 1.

The Court: Defendants' Exhibit A.

DEFENDANTS' EXHIBIT "A"

The same being a portion of Chapter 577 of the New York State Unemployment Insurance Law (Article 18 of the New York State Labor Law, as Amended.)

577. Contribution Rate Credits. Sub-section (d). "Surplus" means that amount by which the moneys in the fund as of the effective date, after subtracting the amount of credits previously established under this section and outstanding as valid on such date, exceed the lesser of nine hundred million dollars or three and one-half times the amount of contributions payable on the payrolls reported by all employers on or before the effective date for the preceding completed calendar year, limited, however to an amount not greater than sixty per centum of such contributions for such year. * * *

Mr. Dimond: And the Report of the New York State Joint Legislative Committee. Mr. Faulkner, I believe there is [18] only one—

Mr. Faulkner: I haven't seen that, so I don't know what is in it.

Mr. Dimond: Page 53, the part marked in red ink.

The Court: That is the second pamphlet?

Mr. Dimond: That is the second pamphlet.

The Court: The second pamphlet may be admitted and marked Defendants' Exhibit B.

DEFENDANTS' EXHIBIT "B"

The same being a portion of page 53 of "Report of the New York State Joint Legislative Committee on Industrial and Labor Conditions. (Legislative Document 1945) No. 39.

IV. Unemployment and Health Insurance. Subparagraph 2. Rate Variation.....
Whatever plan is ultimately adopted should be based upon two intrinsic principles which must underlie the application of any system of rate variation.

The first is that the solvency of the Fund must not be jeopardized. In this connection, the less advantageous economic conditions affecting employment in the postwar period should be taken into account in determining estimates of the Fund's future solvency. The provisions of several bills introduced in this year's Legislature meet this test by requiring a constant reserve of 10.8 per cent of the previous year's total taxable payroll (equivalent to four times the previous year's contributions to the Fund).

Clerk of Court: Page what?

Mr. Dimond: 53.

Clerk of Court: The red ink portions?

Mr. Dimond: Yes. That is all I have.

Whereupon, the hearing was recessed briefly to permit the disposition of other matters which had been previously set, after which the hearing was continued as follows, with all parties present as heretofore:

The Court: You may proceed.

ROBERT PRATHER

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Dimond:

Q. Will you state your name?

A. Robert Prather.

Q. What is your occupation? [19]

A. Chief Accountant for the Commission.

Q. The Employment Security Commission?

A. Yes; the Employment Security Commission.

Q. How long have you been engaged as such Chief Accountant?

A. Approximately two and a half years.

Q. What are your duties in that respect?

A. Among other things my duties include the annual computation of experience rating, for the experience rating proposition.

Q. Do you make the computation of credit for experience rating?

(Testimony of Robert Prather.)

A. Not personally, but it is made under my direction in the accounting section. I supervise them and assume full responsibility for them.

Q. I hand you this paper. Will you please tell the Court what that is?

A. This is a projection of the Unemployment Compensation Fund using the cash contributions method only, and that is the method contended by the plaintiffs. We try to show by this projection that the required reserve would fluctuate very wildly, and experience rating credits would also fluctuate wildly.

The Court:.. What?

A. Experience rating credits and the reserve.

Q. What have you assumed? [20]

A. Annual contributions at two and a half million dollars.

Q. And no change in the employment picture?

A. No change in the total taxable wages under this assumption.

Q. And you have used the alternate 60% for computing surplus? A. Yes.

Q. And you have used only cash contributions?

A. Cash contributions in the determination of surplus and determining of reserve.

Q. If you had used total contributions, as defendants contend should have been used, what would the reserve have been for each year?

A. It would have remained stable at ten million dollars for each of the five years, and contributions would have remained stable, and experience rating

(Testimony of Robert Prather.)

credit would have been one and a half million for each of the years, 60% of the two and a half million dollars.

Mr. Dimond: Do you have any questions?

The Court: I would like to have you restate your last answer, the total reserve.

A. The reserve would have remained stable at ten million dollars for each of the five years.

The Court: And what else?

A. The experience rating credit that would have been issued and distributed among all employers would have been one and a half million dollars as contrasted with the amount shown [21] in the schedule.

The Court: Wait now. You say as contrasted with what amount?

A. The amount shown under columns "Reserve" and "Experience Rating Credit for Next Year." That is abbreviated on the heading.

The Court: "Experience Rating Credit for Next Year." I don't have any "Reserve."

A. In the column to the left.

The Court: It is two columns, not one.

A. Yes, sir; two columns.

The Court: Experience rating credit would have been as you say——

A. One and one half million dollars per year for each of the five years, and the reserve would have remained constant at ten million dollars for each of the five years.

The Court: What are the second, third, fourth and fifth lines?

(Testimony of Robert Prather.)

A. They merely give the continuity of the annual credits and reserves upon which they are based.

The Court: Successive years?

A. Successive years; yes, sir. For example, we start off with an assumed reserve of ten million dollars for the first year, and the second year we find the reserve requirement is only four million dollars, and we could still [22] issue a distributable surplus. That has no meaning. It is fiction, the result of mechanics of the formula and nothing to do with benefit potential based on 2.7 of total taxable wages.

The Court: What isn't clear to me in the lines second, fourth and fifth, is it hypothetical or does it reflect what would be the consequence of this formula contended for by the plaintiffs?

A. Everything in the schedule is hypothetical, but it is brought out to show what would happen under this particular given set of circumstances and to show our reserve requirement as meaning it has to relate to benefit potential. The plaintiffs' contention would destroy that.

Q. Aren't there three things assumed? You assume the amount in the fund is ten million dollars. You assume payrolls are two million five hundred thousand dollars.

A. Total contributions.

Q. Those are two assumptions, the fund ten million dollars, and contributions two million five hundred thousand dollars; and for each of the succeeding years aren't you assuming the payroll level of employment would remain the same?

(Testimony of Robert Prather.)

A. Yes.

Q. And contributions would be the same?

A. Yes.

The Court: What isn't clear to me, do each one of [23] these showings by each line stand by themselves, or is there a connection? In other words, does the second result from working under the first?

Mr. Dimond: I believe it does.

A. It does. The first line, "Experience Rating Credit for Next Year," under that heading, and come down to the next line, the third column from the left, you will find the same amount is carried down. That is the method by which we are trying to show that our reserve will fluctuate, whereas it should not, and that experience rating credit will also fluctuate, whereas there is no basic reasoning for it to fluctuate. In other words, the total contributions are the same.

Mr. Dimond: I believe, your Honor, for the first year if there is a million in experience rating credits used for next year, that will reduce it for the second year.

The Court: This six hundred thousand?

Mr. Dimond: Cash contributions next year would be a million dollars, and experience rating credit a million five hundred thousand dollars; 60% of a million dollars is only six hundred thousand. I mean——

Q. It is four million dollars; isn't that right, Mr. Prather? A. Yes.

(Testimony of Robert Prather.)

Q. It can't be four million; 60% of a million. Is there some mistake there? [24]

A. What line?

Q. That second line. Your reserve is four million dollars. How do you get that?

A. Four times the difference. As I say, starting back with the first line a million five hundred thousand dollars, the amount of credit usable for the succeeding year, if you look on the second year you will find that amount of credit has been used.

Q. The second line?

A. Your third column from the left; and of the total contributions of two and one-half million dollars one million five hundred thousand dollars of that was offset by experience rating credit, leaving a cash contribution of one million dollars, and four times that amount equals the four million dollars reserve, and 60% of that equals the amount in the second from the right-hand column.

Q. And then the reserve is four times your cash contributions each time? A. Yes.

Q. And if four times the total contributions were used, it would be constant at ten million dollars for each of the five years?

A. Yes; that is correct.

The Court: Now, your remark or explanation of line number 2 would also apply to the remaining lines, 3, 4 and 5? [25] A. Yes.

Mr. Dimond: Each is the result of the preceding ones. I should like to offer this in evidence as Defendants' Exhibit C.

(Testimony of Robert Prather.)

Mr. Faulkner: We have the same objection to this. It is a separate set of hypothetical figures, and the question is not what might result from an interpretation. The question is what does the law require. I don't think this throws any light on it at all.

The Court: I understand this is merely explanatory of the method of computation adopted.

Mr. Dimond: Just explanatory, your Honor, to show the results of the plaintiffs' alleged interpretation, to show what would happen, and I think we can show it. It is not wrong to assume certain pay-rolls and reserve if those figures remain constant for a certain length of time.

The Court: I am fully aware of plaintiffs' contention. While this of course would furnish the explanation and the reason, you might say, for having the law the way that it should be, nevertheless the law is not. Therefore, the Court cannot give any consideration to this.

Mr. Dimond: Well, I am trying to show——

The Court: Or at least allow an explanation of this kind or pointing out consequences of this kind to supersede the terms of the statute. [26]

Mr. Dimond: I thought if there was any ambiguity at all in the statute——

The Court: I don't mean to say it is not admissible evidence. It will be admitted in evidence as Defendants' Exhibit C.

(Testimony of Robert Prather.)

DEFENDANTS' EXHIBIT C

Employment Security Commission of Alaska
 Projection of Experience Rating Credit Grants and Fund Reserves Using Cash Contributions Method in
 Computing Surplus

Year	Cash	Exp. Rtg. Cr.	Total	Reserve	Exp. Rtg.		Method
					Next Year	Cr. for	
First	\$2,500,000.00	\$2,500,000.00	\$10,000,000.00	\$1,500,000.00		60% of cash contributions
Second	1,000,000.00	\$1,500,000.00	2,500,000.00	4,000,000.00	600,000.00		60% of cash contributions
Third	1,900,000.00	600,000.00	2,500,000.00	7,600,000.00	1,140,000.00		60% of cash contributions
Fourth	1,350,000.00	1,140,000.00	2,500,000.00	5,440,000.00	816,000.00		60% of cash contributions
Fifth	1,684,000.00	816,000.00	2,500,000.00	6,736,000.00	1,010,400.00		60% of cash contributions

Observations: For purposes of the attached projection, contributions were assumed to be constant at the rate of Two and a Half Million Dollars per year. The above method of determining surplus results in a fluctuating fund reserve requirement as well as a fluctuating annual grant of credit.

Fund reserve is necessarily related to benefit payment potential, which in turn has a direct relationship with taxable wages on which contributions are due at the rate of 2.7%. The "cash method" does not provide this correlational requirement.

The "total contributions" method of determining surplus which was actually used by the Commission, if applied to the above projection, would result in a constant fund reserve of Ten Million Dollars and an annual grant of credit in the amount of \$1,500,000.00 for each of the years projected.

In the attached projection, it is assumed that the Unemployment Compensation Fund was adequate to permit application of the 60% method for determination of surplus.

[Endorsed]: Filed November 13, 1950.

(Testimony of Robert Prather.)

Q. Mr. Prather, do you know whether any credits were issued to the New England Fish Company, one of the petitioners in this case, in 1948?

A. Yes. Credits were issued to the two parties named.

Q. And what amount of credits were issued to each of the two petitioners in 1948?

A. I would have to refer to the files.

The Court: Have you read the answer? Do you know what is set forth in the answer?

Q. Do you know if these are correct?

A. Yes; these amounts are correct. No; I wish to withdraw that statement until I refer to the file that was prepared under my direction, showing the actual computations and amounts of credit issued.

Mr. Dimond: Your Honor, in this case the Commission has drawn up—it is really not a proof of any fact, as much as it is a narrative explanation of the law, how the computations are drawn up, tables, total payrolls, and is in rather complicated form, unless you can read this. I would like to submit it to the Court, not as evidence of facts, but explanatory [27] material. Attached to this explanation I notice——

The Court: Well, it is, you might say, in the nature of the last preceding exhibit?

Mr. Dimond: Well, yes. It shows how credits are actually computed, and they used the plaintiffs, New England Fish Company and Wards Cove Packing Company, as examples, and attached are a history and how they arrived at credit classes.

(Testimony of Robert Prather.)

The Court: Any objection?

Mr. Faulkner: Well, I don't think so, your Honor, except the same objection as to the others, and for the record I make an objection on the same grounds.

The Court: Well, I realize your position is that, while all these things may tend to show the desirability of having this construction, nevertheless the terms of the statute don't warrant it.

Mr. Faulkner: That is right.

The Court: It may be admitted as Defendants' Exhibit D.

Q. Does this show the amounts of credits issued for 1948 and 1949 for the two petitioners that I previously asked you about, Mr. Prather?

A. Yes. These are the forms we use to show the individual computations of each and every employer who is qualified under the act.

Q. My question is, does this show the amounts of credits [28] issued for 1948 and 1949?

A. Yes, they do.

Q. Mr. Prather, were the credits issued these two petitioners for those two years based on the definition as four times the total contributions; that is, four times cash plus credits?

A. Yes. They were based on the consideration that contributions were at the rate of 2.7 of taxable wages reported on or before the cut-off date, in other words total contributions. At no time did we consider cash contributions in the actual individual calculations.

(Testimony of Robert Prather.)

Q. Did you prepare any computation of what the credits would have been for those two companies if only cash contributions had been used, and are the figures contained in the answer in this respect correct?

A. Yes. In this exhibit that has just been presented the amounts have been shown that would have been distributed had only cash contributions been considered. Those amounts are substantially less of course than were actually granted to those employers. In other words, had we followed the employers' contended method, they would have suffered a reduced credit during this particular year.

Q. Which year?

A. The credit year 1949-1950 and also the credit year 1948-1949. [29]

The Court: Am I to understand that would be typical of other years in other words, that the employers would receive less under the method?

Mr. Dimond: Not for each time. I just happened to show these two. They didn't make any complaint under the administrative interpretation but are now alleging it is wrong. I am going to show they have taken advantage of the situation to their benefit.

The Court: For the purpose of precluding—

Mr. Dimond: Yes.

A. I would like to qualify my answer. The amount of credit would have been more or less in the two years I mentioned. I would like to refer to a chart I prepared before answering, just to make sure.

(Testimony of Robert Prather.)

Q. What?

A. I made a statement that the credit to the employers involved would have been less for those two years, 1949-50 and 1948-1949. I would have to check my chart. I know they would have for the year 1949-50.

Q. Will you check for 1948 then?

A. Yes. For the credit year ended June 30, 1949, there would have been a total amount of credit issued of \$1,130,174.88 by the employer contended method, whereas actually under the method used it was \$1,123,571.18.

The Court: Isn't that reflected in the answer? [30]

Mr. Dimond: That is the over-all picture—it is reflected in the answer—of these two plaintiffs. I don't know whether it is important to know the total distributed for those two years.

The Court: I wondered if it was in the answer itself.

Mr. Dimond: No.

Q. What is the difference?

A. Exactly \$6,603.70. That contradicts the statement I previously made that the credit for both those years would have been less by the employer contended method. Actually the credit year 1949-50 would have been less; the other year would have been six thousand dollars more.

Q. In 1948, had his interpretation been followed?

A. Yes.

The Court: In what year?

A. In the credit year ended June 30, 1949.

(Testimony of Robert Prather.)

Cross-Examination

By Mr. Faulkner:

Q. Mr. Prather, have you figured the result for the credit year 1950-1951?

A. Yes, sir; I have. I had to make an assumption before I could do that. I had to assume that contributions remained level. [31]

Q. Well, wouldn't that be based on the contributions for 1949?

A. That would be based—did you say the credit year 1950-51?

Q. 1951.

A. 1951 would be based on the total taxable wages in 1950 and since we haven't experienced those wages, we don't know.

Q. You cut off credits July 1, 1950?

A. Yes; as of July 1, 1950.

Q. If you hadn't cut them off, what would you base them on if you continued them? On 1949?

A. Yes.

Q. You haven't figured what that would be?

A. Yes, sir; I have.

Q. What is the difference?

A. The amount of credit would have been \$822,-
311.48.

Q. Under which method?

A. Plaintiffs' contended method.

Q. Under yours what would it be?

A. Nothing. The fund—as a matter of fact the

(Testimony of Robert Prather.)

reserve was inadequate to permit the issuance of credit.

Q. Mr. Prather, in preparing these Exhibits C and D you used hypothetical figures there, did you?

A. What was that?

Q. The statement you gave the Court there, Exhibit C?

A. Was that the last one with a narrative report? [32]

Q. No. "C." A. Yes.

Q. You talked about having a surplus of ten million dollars. There is no requirement of law that the surplus be any particular figure?

A. It must be equal to four times the previous year's contributions.

Q. But not in money, like in New York?

A. It is not expressed in terms of money.

Q. There are other things that enter into the condition of that surplus besides credit and contributions, aren't there; other things that affect it?

A. That affect the——

Q. Surplus, and the total amount in the fund?

A. Well, yes. We must consider the qualified employers and——

Q. What I meant was this. Certainly the fund, what you call the Unemployment Trust Fund, that is for the purpose of making payments to those unemployed?

A. That is the sole purpose of it.

Q. That fund then is greatly affected by the

(Testimony of Robert Prather.)

payments you make to the unemployed during the year? A. Yes; that is correct.

Q. That is the principal thing that would affect it?

A. That would affect it, together with any fluctuation and cash contributions. [33]

Q. Now, in 1949 there were increased unemployment payments by almost eighty-two and a half per cent over 1948?

A. Is that the amount reflected in our annual report? If so, it is correct.

Q. I have it here. So that was the big factor that affected the fund in 1949, wasn't it? You don't mean to say payrolls decreased any in 1949?

A. Yes; payrolls did.

Q. Did decrease?

A. Total payrolls increased in 1949, but the cash contributions did decline slightly.

Q. But there was an increase of 82.46%?

A. In the benefits?

Q. In the Unemployment payments?

A. If that is what the report refers to, I will grant that.

Q. I will show it to you so there will be no mistake. The top of the page there.

The Court: When you say payrolls in 1949 increased but cash contributions declined would that be because of credits, an increase in credits?

A. I am sorry, your Honor—

The Court: When you say payrolls in 1949 in-

(Testimony of Robert Prather.)

creased but cash contributions declined, would that be because of an increase in credits?

A. That results from the amount of experience rating credit [34] that has been issued in previous years which affect these two years. Our experience rating credit is during one year but applies for two years. It would result in a reduction in cash, assuming total contributions to be level; any difference here is the result of differences in the amount of credit used by employers as well as in total contributions for two years. I probably am not too clear on that point.

The Court: You have said it in a great many words when it could be in a few words.

A. There are several factors that would change. The proportion of cash to total——

The Court: My question is, if payrolls in 1949 increased but cash contributions declined, would that be due to an increase in credits?

A. Yes, sir; that is substantially correct, except that total payrolls have increased also and in proportion I can't say whether cash contributions; total contributions did increase in 1949; total cash contributions decreased slightly in 1949; and that is the result in the difference of amounts of E.R.C. applied during those two years. In other words, total cash contributions plus total experience rating applied equals 2.7%. If you increase one, you are going to decrease the other as a by-product, assuming the total contributions remain level. [35]

Mr. Faulkner: I think there are no more ques-

(Testimony of Robert Prather.)

tions. I think the Court understands that the credit year commences July 1st.

The Court: I was going to inquire why.

Mr. Faulkner: Perhaps I better ask him. That is the way it is set up in the law.

Q. Will you explain why credit commences July 1st and you deal with payrolls on a calendar year basis?

A. The reason for that is that contributions are on a quarterly basis and after they are completed—so, if, referring to the calendar year 1949, the fourth quarter reports wouldn't come until the first quarter 1950, so to make it possible from a bookkeeping standpoint we must wait until spring the following year when we have all the payrolls at hand, when the computations are made with a reasonable time. We can't do it until six months following the calendar year.

The Court: What is it you can do at the end of the calendar year?

A. We refer to contributions applicable to a particular calendar year; in the surplus formula contributions are applicable to four calendar quarters of the calendar year. This is further complicated—

The Court: You might say there is a lag between the receipt and the application or distribution of credits? [36]

A. Yes, sir; correct. There is three years involved. When the Commission computed its surplus in March, 1947, it considered 1946 payrolls and

(Testimony of Robert Prather.)

allowed rating credit to be off-set the last half of 1947 and the first half of 1948. So, there is three years involved in each annual grant. There is three annual factors involved.

Q. What you mean is that an employer gets his credit on the three years previous experience?

A. That is another consideration. In the determination of a qualified employer——

Q. Well, a new one coming in gets nothing through the first year because it is based on payroll decline? A. Yes.

Q. An entirely new person, he doesn't get it until he has the three years?

A. He must have three full years plus——

Q. In the meantime he must pay 2.7%?

A. That is right.

Q. And that is the experience of the employers in this case; they were qualified but they hadn't paid in; until three years, then they got credit?

A. That is right.

Mr. Faulkner: That is all.

Mr. Dimond: That is all.

(Witness excused.) [37]

Whereupon, H. L. Faulkner, of attorneys for plaintiffs, made the opening argument to the Court in behalf of the plaintiffs; a form of Employer's Experience Rating Credit Notice was introduced in evidence as Plaintiff's Exhibit No. 1 for the purpose of illustration; the Court ordered that this cause No. 6377-A and cause No. 6356-A, both having

the same title as hereinbefore set out, be consolidated for trial and argument; John H. Dimond, Assistant Attorney General of the Territory of Alaska, made the argument to the Court in behalf of the defendants; and H. L. Faulkner, of attorneys for plaintiffs, made the closing argument to the Court in behalf of the plaintiffs; and

Thereupon, the Court took the matter under advisement.

(End of Record.)

91

United States of America,
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove-entitled court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled causes, viz. New England Fish Company, a corporation, and Wards Cove Packing Company, a corporation, for themselves and all others similarly situated, Plaintiffs, vs. George Vaara, Anthony Zorich, Ralph J. Rivers, as the Employment Security Commission of Alaska, and R. E. Sheldon, Director and Chief Executive thereof, Defendants, Nos. 6356-A and 6377-A of the files of said court;

That I reported said cause in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 38, both inclusive, contain a full, true and correct transcript of all the testimony and proceedings at the trial of the above-entitled cause, to the best of my ability.

Witness, my signature this 23rd day of January, 1951.

/s/ MILDRED K. MAYNARD,
Official Court Reporter.

[Title of District Court and Cause.]

United States of America,
Territory of Alaska, First Division—ss.

CERTIFICATE OF CLERK

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings, which were filed in Cause Nos. 6356-A and 6377-A, which was combined in this court for trial, and is being appealed under the title: New England Fish Co., et al., vs. George Vaara, et al., etc., are the original pleadings and orders filed in said cases and which were designated by the parties hereto as being the pleadings to constitute the record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the above-entitled court at Juneau, Alaska, this 21st day of March, 1951.

[Seal] /s/ J. W. LEIVERS,
Clerk of District Court.

[Endorsed]: No. 12872. United States Court of Appeals for the Ninth Circuit. George Vaara, Anthony Zorich, Ralph J. Rivers, as the Employment Security Commission of Alaska and R. E. Sheldon, Director and Chief Executive thereof, Appellants, vs. New England Fish Company, a Corporation and Wards Cove Packing Company, a Corporation, for Themselves and All Others Similarly Situated, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Division Number One.

Filed March 2, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12872

GEORGE VAARA, ANTHONY ZORICH,
RALPH J. RIVERS, as the Employment Security Commission of Alaska, and R. E. SHELDON, Director and Chief Executive Thereof,
Appellants,

vs.

NEW ENGLAND FISH COMPANY, a Corporation, and WARDS COVE PACKING COMPANY, a Corporation, for Themselves and All Others Similarly Situated,

Appellees.

APPELLANTS' STATEMENT OF POINTS
AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED

Come now appellants above named and adopt the Statement of Points to be Relied on by Appellants, filed with the clerk of the district court, as their statement of points to be relied upon in the United States Court of Appeals, and pray that the whole of the record as filed and certified be printed.

Dated at Juneau, Alaska this 28th day of February, 1951.

J. GERALD WILLIAMS,
Attorney General of Alaska.

/s/ JOHN H. DIMOND,
Assistant Attorney General,
Attorneys for Appellants.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 3, 1951.

No. 12,872

IN THE

United States Court of Appeals
For the Ninth Circuit

GEORGE VAARA, ANTHONY ZORICH, RALPH
J. RIVERS, as the Employment Security
Commission of Alaska, and R. E.
SHELDON, Director and Chief Execu-
tive thereof,

Appellants,

vs.

NEW ENGLAND FISH COMPANY, a corpo-
ration, and WARDS COVE PACKING COM-
PANY, a corporation, for themselves
and all others similarly situated,

Appellees.

Upon Appeal from the District Court
for the Territory of Alaska,
Division Number One.

BRIEF FOR APPELLANTS.

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FILED

MAY - 4 1951

PAUL W. O'BRIEN,

CLERK



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No. 12,872

IN THE

**United States Court of Appeals
For the Ninth Circuit**

GEORGE VAARA, ANTHONY ZORICH, RALPH
J. RIVERS, as the Employment Security
Commission of Alaska, and R. E.
SHELDON, Director and Chief Execu-
tive thereof,

Appellants,

vs.

NEW ENGLAND FISH COMPANY, a corpo-
ration, and WARDS COVE PACKING COM-
PANY, a corporation, for themselves
and all others similarly situated,

Appellees.

Upon Appeal from the District Court
for the Territory of Alaska,
Division Number One.

BRIEF FOR APPELLANTS.

OPINION BELOW.

The opinion of the District Court, as yet unre-
ported, will be found at R. 70.

JURISDICTION.

This suit is a consolidation of two actions (R. 69) brought by the appellees to contest the validity of appellants' administrative determination to the effect that no surplus, distributable as experience rating credits, existed in the Alaska Unemployment Compensation Fund for the credit year July 1, 1950, to June 30, 1951. This determination was made by appellants under their construction of the definition of "surplus" as that word is used in § 51-5-5(c)(1)(G) ACLA 1949. The first action is a suit for mandatory injunction filed in the District Court for the District of Alaska, Division No. 1 at Juneau, which appears in the record at pages 3 to 10 inclusive (R. 3), the jurisdiction of the District Court having been invoked under the Act of June 6, 1900, c. 786, § 4, 31 Stat. 322, as amended, 48 USCA § 101. The second action was commenced by filing in the same court a petition for review of a decision of the Employment Security Commission of Alaska, (R. 11-22 inc.) the jurisdiction of the District Court being based upon administrative procedure for such review provided for in the Alaska Employment Security Law, § 51-5-7(h)(i) ACLA 1949. Judgment and decree was entered on January 18, 1951, (R. pp. 85-87 inc.) declaring that appellants' construction of the Act had been erroneous and requiring them to recompute and assign to appellees and all others similarly situated experience rating credits for the credit year 1950-1951 (R. 85). An appeal was taken on February 14, 1951, by filing with the District Court a notice of appeal

(R. 88). The jurisdiction of this court rests on § 1291 of the New Federal Judicial Code.

QUESTIONS PRESENTED.

1. Under the provisions of the Alaska Employment Security Law (Chapter 5 of Title 51, ACLA 1949), in determining whether there is in the Unemployment Trust Fund a surplus available for credit ratings may the Employment Security Commission include as "contributions paid" with respect to pay rolls paid by all employers for the preceding calendar year both money payments and also credits applied in payment of tax for said year, as permitted by Section 51-5-5(c)(2)(G) ACLA 1949.

2. Have the appellees who, during each of the years 1948 and 1949, knew that the appellants were determining experience rating credits for said years by including as "contributions paid" both money payments and Experience Rating Credits, and who, in each of said years, have received, kept and used said Experience Rating Credits as so determined, estopped themselves from bringing, maintaining and recovering in these actions?

STATEMENT.

1. THE ALASKA EMPLOYMENT SECURITY LAW.

(a) In general.

The Alaska Employment Security Law (Act of April 2, 1937, as amended, §§ 51-5-1 to 51-5-20 ACLA 1949), until 1949 known as the Alaska Unemployment Compensation Law (hereinafter referred to as "the Act"), sets up a comprehensive plan to provide unemployment benefits for workers in the Territory during times when they are unemployed—the funds for such benefits being derived from a tax imposed on qualified employers within the Territory. Such employers are required to pay into an Unemployment Compensation Fund (hereafter referred to as the "Fund") "contributions" equal to 2.7 per cent of wages payable by them for employment during each calendar year, such payments to be made on a quarterly basis. The term "contributions" is defined in Section 1 of the Act (§ 51-5-1(d) ACLA 1949) as follows:

"As used in this Act, unless the context clearly requires otherwise—'Contributions' means the money payments to the Alaska unemployment compensation fund required by this Act."

The objective of the Territorial legislature, in enacting this statute (as found in the note following § 51-5-20 ACLA 1949) is, in brief, to relieve economic insecurity due to involuntary employment by encouraging employers to provide more stable employment, and by the systematic accumulation of funds during periods of employment from which benefits may be

paid during periods of unemployment. Out of the funds so accumulated benefits are payable to the unemployed upon prescribed conditions and at designated rates.

(b) The experience rating provisions.

(1) Legislative history.

In 1941 the Alaska Legislature passed an amendment to the Act (Sec. 20, Chapter 40, Session Laws of Alaska, 1941), the pertinent parts of which read as follows:

“Section 20. That Chapter 4, Sections 7(c),
* * * Extraordinary Session Laws of Alaska,
1939, be amended by striking out the present sections and inserting in lieu thereof the following:

Section 7(c). ‘Study of Experience Rating.’
The Commission shall investigate and study the operation of this act and the actual experience hereunder in the light of pertinent economic factors, with a view to determining the advisability of establishing a rating system which would equitably rate the unemployment risk and fix the contribution to the fund of each employer and would encourage stabilization.”

Pursuant to that amendment the appellants made the investigations and study as directed (‘Testimony McLaughlin R. pp. 96 *et seq.*) and submitted to the legislature the result of said study together with a draft of recommended legislation following New York’s system which was based on total pay roll, because the pay roll base furnished an inherent relationship between both benefits paid and Fund reserve

(Testimony McLaughlin, R. p. 97) (that draft was not placed in evidence but was contained in the report of the Commission to the legislature entitled "Unemployed Compensation Commission of Alaska Employer Experience Rating Studies"). With changes in the wording and additions immaterial to this case, the legislature adopted said recommended legislation as an amendment to the Act and it became Section 1, Chapter 74, Session Laws of Alaska, 1947. A copy of said Section 1 is printed in the Appendix hereto. Additions to the Commission's draft are printed in italics and the original words of the draft for which others were substituted are in brackets preceding italics.

Under this amendment experience risk of unemployment is measured by variations in the employment pay roll. Thus employers who have shown over a specified period of time, little or no annual decline in pay roll or remuneration are favored in that they are required to pay to the fund less money on their 2.7% tax (contributions) on pay roll than those employers with relatively greater declines in pay rolls. In brief, this plan is effected by first measuring the employer's risk of unemployment by various factors related to a decline in pay roll for a specified period of time. These factors are then converted into credit classes to which the employers are assigned. For each credit class a "Class Credit Factor" (Sec. 51-5-5 (2) (E) ACLA 1949) is computed. The employer's taxable pay roll for the preceding year is then multiplied by the "Class Credit Factor" and the result is

the amount of experience rating credit to which he is entitled. The next and final step is to provide the employer with a credit notice for a specified amount of credit, which amount may be applied by him in lieu of cash upon the contributions required under the Act for the four quarters of what is termed the credit year, i.e., the year commencing July 1 immediately following the cut-off date (March 15). Such credit may be used in lieu of cash contributions by such employer only for the particular credit year for which it was issued and may not be converted into cash or transferred to any other employer other than a successor. However, the amount of experience rating credits issued to each of the employers is available to said employer as a credit upon his federal Social Security tax with relation to employment the same as if it had been paid in cash (Secs. 1601, 1602 and 1903 as amended, Internal Revenue Code; Secs. 1601, 1602 and 1603, Title 26 USCA).

(2) Administrative practice and interpretation of the act relating to "contributions" and "surplus".

(A) THE APPELLANTS' COMPUTATIONS.

Under the amendment of 1947, appellants were required to make computations involving "surplus" and "reserve" in the fund and determine the amount of experience rating credits to be allowed to each qualified employer in each of the classes into which said employers fell, except Class 1, and during each of the years 1948, 1949 and 1950 the appellants, acting under the provisions of the Act as amended and after consideration of its provisions in the light of its ob-

jectives and "pertinent economic factors" and the necessity of maintaining in the fund at all times sufficient money to pay benefits (Testimony McLaughlin, R. pp. 101-2) made said computations and determinations. In making said computations and determinations, the appellants computed the surplus available for distribution as experience rating credits as the amount of money remaining in the fund after subtracting therefrom four times the amount of contributions paid for the preceding year, and they construed contributions to mean the sum of cash and credits applied in payment thereof.

In accordance with their construction set forth above, on March 15, 1950 (the cut-off date) the total amount of money in the fund was \$9,397,006.93. For the preceding calendar year employers in the period had paid into the fund in money \$1,370,519.14 in cash and had been issued experience rating credits in the sum of \$1,016,413.49. The total contributions, as interpreted by the appellants, was the sum of two amounts, that is, \$2,386,932.63. Four times this latter amount equals \$9,547,730.52. Therefore the amount in the fund did not exceed four times the contributions as required, and indicated no surplus in accordance with the provisions of Section 51-5-5(2)1(G)(1) (2) ACLA 1949 (R. 29).

(B) THE APPELLEES' COMPUTATIONS.

If contributions must be construed as meaning only money payments, then four times the money payments would give a product of \$5,482,076.56 which, sub-

tracted from the total amount in the fund, would leave a surplus of \$3,914,930.37; but this figure is greater than 60% of such contributions. Therefore 60% of \$1,370,519.14 would constitute the surplus available for experience rating credits. Moreover, the requirement that surplus amount to at least 10% of the contributions before it can be used for credits would be satisfied. Consequently \$882,311.48 would constitute the amount of experience rating credits to be issued, thereby reducing the amount of cash payments that each employer above credit Class 1 would be compelled to make for the applicable credit year (R. pp. 79-82).

(C) PROCEEDINGS IN THE DISTRICT COURT.

The appellees, questioning the validity of the appellants' administrative determination that no credits would be issued for the credit year 1950-1951, and having exhausted their remedies before the Commission, instituted a suit for a mandatory injunction on October 11, 1950, to compel the appellants to issue credits for such year (R. 3). Appellants' answer was filed on November 1, 1950 (R. 54), and on the same day appellees in a separate action filed another complaint entitled "Petition for Review of Decision of Employment Security Commission of Alaska", for the purpose of complying with the administrative procedure set forth in the Act for review of the appellants' findings that no credits would be issued to appellees and other qualified employers similarly situated (R. 11). The relief sought in this latter action was identical with that prayed for in the injunction suit (R. 9, 21). Appellees filed their answer to this

petition (R. 61), and on November 13, 1950, the day of trial, the above two actions were consolidated (R. 69). At the trial John T. McLaughlin, Director of the Unemployment Insurance Division of the Alaska Employment Security Commission, and Robert Prather, Chief Accountant for the Commission, testified in behalf of appellants in support of the second and third defenses contained in appellants' answers (R. 96-131); and appellees had no witnesses. The court took the matter under advisement, and on February 27, 1950, filed its written opinion holding that although appellants' interpretation of contributions as comprising both cash payments and credits would give the Act the effect it undoubtedly should have, yet the legislature had failed, in defining "contributions" as "money payments * * *" (Sec. 51-5-1(d) ACLA 1949), to use language expressive of the intent urged by appellants, and that this obvious omission of the legislature could not be supplied by administrative construction (R. 70-75). With respect to appellants' argument that appellees were estopped from questioning the validity of the administrative construction of the Act (appellants' third defense in their answers, R. 59, 65), the court merely stated:

"In my opinion the doctrine of estoppel urged by the defendants is not applicable to a situation such as the one here dealt with."

Finding of fact and conclusions of law were then filed in accordance with the court's opinion (R. 76), and on January 18, 1951, judgment and decree was entered (R. 85). This appeal followed (R. 88).

SPECIFICATIONS OF ERROR.

The specifications of error and the points relied upon by appellants may be summarized as follows:

1. The court erred in holding that the computation made by appellants, from which it was determined that no surplus, distributable for experience rating credits, existed in the Alaska Unemployment Compensation Fund as of March 15, 1950, was erroneous in that such computation was made on the basis of "contributions", meaning not merely cash payments but the sum of such cash payments and experience rating credits (R. 83, 88).

2. The court erred in finding that for the calendar year 1949 total contributions from all employers in the Territory amounted to \$1,370,519.14, that on March 15, 1949, there existed in the Alaska Unemployment Compensation Fund a surplus which exceeded four times such contributions by \$3,914,930.37, and that on said date there was in the fund \$822,311.48 available for distribution as experience rating credits for the credit year July 1, 1950-June 30, 1951 (R. 79, 82, 89).

3. The court erred in holding that the appellees were not estopped from questioning appellants' determination of the meaning of "contributions" as that word is used in the definition of "surplus" in the Alaska Employment Security Law, Section 51-5-5(c) (1)(G) ACLA 1949 (R. 75, 89-90).

4. The court erred in entering judgment and decree in favor of appellees, and in ordering appellants to recompute the surplus in the Alaska Unemploy-

ment Compensation Fund as of March 15, 1950 to assign experience rating credits to appellees and all others similarly situated for the credit year July 1, 1950-June 30, 1951, and to make refunds to appellees and all others similarly situated of cash contributions made by them for the said credit year in excess of the cash contributions which would be required after experience rating credits in the amount of \$822,311.48 have been issued (R. 83-84, 86-87, 90).

SUMMARY OF ARGUMENT.

A. The language of the act did not require the construction placed upon it by the District Court and formalistic canons of statutory construction should not be used to defeat the primary legislative objective.

The District Court based its decree upon the meaning it gave to the word "money" in the definition of "contributions" and the impact of the word "paid" which in places in the Act modifies the word "contributions", and the opinion of that court that there was in the Act no ambiguity justifying the interpretation of those words.

Those two words did not necessarily require placing upon them the meanings placed upon them by the court. Ambiguity arose because these words as construed by the court would have been destructive of, and in opposition to the purpose of the Act as a whole, and especially the amendment to the Act of 1947.

B. *The primary objective of the Alaska Employment Security Act demands that the administrative construction thereof be upheld.*

The primary purposes of the Act were to relieve hardships resulting from unemployment by the payment of benefits to the unemployed, and the most important machinery for paying such benefits are collection of taxes applicable to benefits and the building up and maintenance of a reserve fund sufficient to ensure those payments when they were most needed in times of great unemployment. The amount of that reserve has been found by the New York Commission for the study of this problem to be 10.8% of payroll. The Alaska Act practically requires that amount of reserve.

C. *Legislative objectives will be effectuated only if the reserve in the unemployment compensation fund bears a direct relation to the total level of employment in the territory.*

D. *The construction of the Act urged by appellees will destroy established legislative objectives.*

The construction of the statute made by the District Court and contended for by appellees will reduce that 10.8% irregularly, and, ultimately, to less than half of that reserve. It will, in part, take the determination of the reserve from the Commission and give it to the employers. It will make the reserve fluctuate from year to year and in times of great unemployment when the number of unemployed requiring benefits is greatly increased and the number of employed will

be decreased and contributions to the fund therefore smaller, and benefits larger.

E. Appellees are estopped to question the administrative construction of the Act.

By acquiescence in the Commission's construction of the Act, and receiving credits larger than they would have received under their own construction, the appellees have estopped themselves from maintaining these actions.

ARGUMENT.

A. THE LANGUAGE OF THE ACT DID NOT REQUIRE THE CONSTRUCTION PLACED UPON IT BY THE DISTRICT COURT AND FORMALISTIC CANONS OF STATUTORY CONSTRUCTION SHOULD NOT BE USED TO DEFEAT THE PRIMARY LEGISLATIVE OBJECTIVE.

The opinion of the district judge (Tr. pp. 70-75) shows that the District Court's decree was based upon the use of two words in the law. The word "money" qualifying "payments" appearing in the statutory definition of the "contributions" and the word "paid" following the word "contributions" in parts of the Act. Money is a widely varying and inclusive term. It can be narrowed to mean legal tender only but in its generally accepted meanings it applies to any medium of exchange and is a measure of value. The rate of the required tax has not been changed. It is still 2.7% of the taxable payroll which qualified employers are still required to pay, but as a reward of merit the law makes Experience Rating

Credits a medium of exchange for the particular purpose of paying such tax.

“Paid” is an even broader word. It simply implies that a demand has been satisfied. In payment of rents crops are sometimes taken. Poll taxes were formerly paid by labor on roads. The word “paid” does not necessarily indicate payment with money. These Experience Rating Credits are issued by the Commission and placed in the hands of the employer. By the construction of the Act itself the employer may apply these credits “against contributions which are payable by him on wages * * * for *payment of contributions* * * *” (51-5-5(2)(G) ACLA 1949. (Emphasis added.) Not only are these credits payment against contributions (which is only a less odious word for taxes) in the Territory of Alaska, but they are also available as payments against the 3% Social Security taxes imposed by the United States (Secs. 1601, 1602, Internal Revenue Code, Secs. 1601, 1602, Title 26, USCA). Under these conditions it does no violence to language to say that the contribution is paid when credits are applied. That the construction placed upon the Act by the District Court is destructive of and contrary to the intent of the legislature is practically admitted by the District Court in its opinion and is pointed out in detail in the succeeding parts of this brief.

The District Court acted upon the assumption that no ambiguity appeared in the Act.

“Ambiguity of statutes may arise otherwise than from fault of expression. An ambiguity justifying the interpretation of a statute is not

simply that arising from the meaning of particular words but includes such as may arise in respect to the general scope and meaning of the statute when all its provisions are examined.” (50 Am. Jur. Statutes, Sec. 226, p. 209.)

In *Clayton v. Colorado & S.R. Co.*, 55 F. (2d) 977, 82 ALR 417, 422, a case involving the question of exemption from a tax, Judge Phillips in delivering the opinion said:

“The primary rule in the construction of statutes is to ascertain and give effect to the intent of the legislative body. (Citations.) Where the language of a statute is plain and unambiguous, and conveys a clear and definite meaning, resort must not be had, ordinarily, to rules of construction, but the statute must be given its plain and obvious meaning. (Citations.) Where, however, the language is of doubtful meaning, or where adherence to the strict letter would lead to injustice or absurdity, or result in contradictory provisions, it devolves upon the court to ascertain the true meaning. (Citations.) The general design and purpose of a statute should be kept in mind and its provisions should be given a fair and reasonable construction with a view to effecting its purpose and object. (Citations.)”

The District Court ignored entirely the established rules of construction set forth in American Jurisprudence and the decision above quoted. The provisions of the Act must be effective to carry out the intent and purpose of the Act, and the effect of the interpretation contended for by the appellees upon those provisions will be discussed particularly

and in detail in the succeeding portions of the argument.

Formalistic canons of statutory construction should not be used to defeat the dominant legislative objective.

One rule of statutory construction states that when a statute contains no ambiguity, it must be taken literally and given effect according to its language, and that this rule should not be put aside to avoid hardships that may sometime result from giving effect to the legislative purpose. *Commissioner of Immigration v. Gottlieb*, 265 U.S. 310, 313. But here the legislature itself has indicated its intent not to maintain strict adherence to the literal meaning of certain words and terms by providing before each legislative definition the words "unless the context clearly requires otherwise" (§51-5-1 ACLA 1949). It may be true, as the District Court has held, that "context" refers to the "immediate rather than the remote company in which the words are found by which their meaning must be judged" (R. 75); but in order to determine properly whether the context clearly requires that some different meaning be attributed to a particular word, which is part of the process of interpretation, not only the context but also the purposes of the law and the circumstances under which the words were employed must be considered. If in considering the context, in the light of obvious legislative objectives, the interpretation of a statutory provision according to the letter without regard to the legislative policy and purposes of the law, would defeat the objectives to be achieved, then the Court does

not have to adhere to such strictness but should rather so interpret the law as to give to it the effect intended. This is well stated by Mr. Justice Sutherland in the case of *Ozawa v. United States*, 260 U.S. 178, at p. 194, 67 L. Ed. 199, 207 as follows:

“It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.”

See also, *Helvering v. New York Trust Company*, 292 U.S. 455, 464-465, 78 L. Ed. 1361, 1363.

The rule that the strict letter of a statute must yield to its evident spirit and purpose when necessary to give effect to the intent of the legislature does not lose its effectiveness because of a legislative definition. First of all, in the original Unemployment Compensation Act of 1937 the literal meaning of contributions, even in the absence of a statutory definition, could have meant only money payments since one could only gather from reading the statute that what was meant to be “paid” was a certain percentage of the employers’ pay roll. The statutory definition, then, in Section 1(d) of the Act (§51-5-1(d) ACLA 1949) was superfluous and added nothing to the meaning of the word contributions, and thus could not possibly

detract from the force of the rule mentioned above. Secondly, although statutory definitions control the meaning of words in the usual case, this is not always the rule, for here when the definition of contributions is read into the 1947 experience rating amendment to the Act in a mechanical fashion, thus destroying the major purpose of the Act, then we have an unusual case and one for an exception to the rule that statutory definitions control. It is inconceivable that the Territorial legislature intended to destroy the major dominant purpose of the Alaska Employment Security Law by such a strict mechanical adherence to the lifeless words of this statute. As the United States Supreme Court stated in a case where the statutory definition of a word in the Langshoremen's and Harbor Workers' Compensation Act was concerned, *Lawson v. Suwannee S. S. Co.*, 336 U.S. 198, 201, 93 L. Ed. 611, 614-15:

"If Congress intended to use the term 'disability' as a term of art, a shorthand way of referring to the statutory definition, the employer must pay total compensation. If Congress intended a broader and more usual concept of the word, the judgment below must be affirmed. Statutory definitions control the meaning of statutory words, of course, in the usual case. But this is an unusual case. If we read the definition into §8(f)(1) in a mechanical fashion, we create obvious incongruities in the language, and we destroy one of the major purposes of the second injury provision: the prevention of employer discrimination against handicapped workers. We have concluded that Congress would not have intended such a result."

Another rule of construction says that there is a presumption that identical words in different parts of the same Act are intended to have the same meaning. But this presumption is not rigid and readily yields when there is such a variation in the connection in which the words are used to warrant the conclusion that they were employed in different parts of the same act with different intent. *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433, 76 L. Ed. 1204, 1207. Such is the case here. When the original Act was passed in 1937, the word contributions necessarily meant only money since there were no experience rating credits at that time, and hence employers simply paid cash into the unemployment compensation fund without any exemptions or reduced rates. But when in 1947 the experience rating provisions were added to the Act, they were not the type of an amendatory Act that changed the existing language. They added something entirely new to what was already the law. It could not have been the purpose of the amendment to now allow certain exemptions from the unemployment tax and at the same time to permit the unemployment compensation fund to become insolvent—something that would certainly happen eventually if the meaning of contributions as used in the original Act was carried over unchanged into the definition of “surplus” as that word is used in the experience rating provisions of the 1947 amendment. There certainly has been a sufficient showing here to warrant the conclusion that the word “contributions” as it was used in the original Act and again in the amenda-

tory Act was employed in these two places with a different intent.

“There is no rule of statutory construction which precludes the court from giving to the word the meaning which the legislature intended it should have in each instance.” *Atlantic Cleaners & Dyers v. United States*, supra, p. 433, 76 L. Ed. 1204, 1207.

There is, however, a rule of statutory construction with which appellants will not quarrel. This rule, which is universally recognized and accepted, is to the effect that the practical construction of a statute by the executive department charged with its administration is entitled to the highest respect from the courts, especially when contemporaneous with the first workings of the statute and when such department suggested the enactment of the statute or cooperated in its development. *United States v. American Trucking Associations*, 310 U.S. 534, 549, 84 L. Ed. 1345, 1354; *Colgate Co. v. United States*, 320 U.S. 422, 426, 88 L. Ed. 143, 147; *White v. Winchester Club*, 315 U.S. 32, 41, 86 L. Ed. 619, 625; *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315, 77 L. Ed. 796, 807. This rule is applicable even though the administrative interpretation was not reached in a trial by adversary form but is evidenced by interpretative bulletins or informal rulings. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140, 89 L. Ed. 124, 129.

In the case at bar the legislature directed the appellants to study and investigate the possibility of adding experience rating provisions to the Employ-

ment Security Law (Section 20 of Chapter 40 Session Laws of Alaska 1941) and the evidence shows that after the study was made, it was concluded that the plan of experience rating which was finally adopted was best suited to achieve the primary objective of providing a fund out of which benefits could be paid to the unemployed with due regard at all times for the adequacy of such fund. (R. 96-98.) Thus, the appellants, whose duty it was to make these provisions of the law operative, could be presumed to know better than anyone else the interpretation of particular terms of the Act which would be necessary in order to make such operation efficient and in conformity with the objectives of the legislature. Moreover, as the evidence also shows (R. 101-102), the administrative construction in this case was reached not without some thought and consideration by the appellants. That these things should be given consideration by the Court has been very ably pointed out by the Supreme Court of the United States in the case of *Skidmore v. Swift & Co.*, supra, where at pages 139-140, 89 L. Ed. 124, 129, it was said:

“But the Administrator’s policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case * * * We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a

judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

B. THE PRIMARY OBJECTIVE OF THE ALASKA EMPLOYMENT SECURITY LAW DEMANDS THAT THE ADMINISTRATIVE CONSTRUCTION OF THE ACT BE UPHELD.

Although one of the purposes of the experience rating provisions of the Act is to allocate the social costs of unemployment to the employers responsible for those costs, and to induce employers to stabilize their operations, thus preventing unemployment, the dominant objective of the legislature in enacting this law was to relieve economic insecurity due to unemployment by the systematic accumulation of funds during periods of employment from which benefits can be paid during periods of unemployment. (See Declaration of Policy following §51-5-20 ACLA 1949.) This major end to be achieved must be considered with respect to the experience rating provisions as well as with respect to the original unemployment compensation act as it existed before such provisions were added, for it could not be presumed that the legislature intended to induce stabilization of employment by experience rating and at the same time to forget about the accumulation of funds for potential unemployment benefits.

Keeping this in mind, it is clear that when the legislature provided in the 1947 amendment that certain employers should be entitled to make payments upon contributions by means of experience rating credits (which has the practical effect of reducing the amount of money paid into the unemployment compensation fund where accumulations are made for unemployment benefits), the adequacy of such fund for payment of those benefits would have to be safeguarded. This means that the fund must at all times be sufficiently large to pay benefits during periods of unemployment while the amount of money coming into such fund is being reduced by reason of experience rating credits. Thus, this is nothing more than saying that before a surplus would exist in the fund to be distributed as credits, the amount of money in the fund must exceed a fixed minimum reserve.

It is as to what factors determine such reserve that appellants' contentions in this case rest. In 1947 the legislature provided that a surplus distributable as credits would exist in the fund when the amount of money therein exceeded four times the amount of contributions paid by employers for the preceding calendar year. (§51-5-5 ACLA 1949.) At that time, since no experience rating credits had before been issued, the contributions for the calendar year 1946 consisted entirely of cash payments made by employers at the rate of 2.7 per cent of their *taxable pay rolls*. Hence, in specifying what made up the surplus, the legislature, in effect, decided what the required reserve in the fund should be; that is, it determined that the Fund would be adequate in amount

to allow a reduced rate of contributions when the total monies in the fund exceeded four times 2.7 per cent (or 10.8 per cent) of the preceding year's *total taxable pay rolls*. If this, then, was a legislative determination of what was to be the reserve requirement for the first year that experience rating credits were issued, there is no reason for assuming that the reserve should be any different or should be measured or ascertained by some other factors or conditions in subsequent years. Consequently, appellants in determining whether a surplus existed for the years 1948-1949-1950, did so knowing that such was their intent when they worded and recommended the draft which the legislature adopted and on the assumption that the legislature had the same intent, and thus based their determination on the ground that "contributions" (as that word is used in the definition of "surplus", §51-5-5(c)(1)(G) ACLA 1949), meant all payments including experience rating credits, since the sum of these two items constituted 2.7 per cent of the *total taxable pay rolls* in the Territory. If this interpretation had not been followed and only cash payments were considered to constitute contributions in the determination of surplus, then since previous issuance of credits had reduced the amount of cash that many employers were obliged to pay to something less than 2.7 per cent of their *pay rolls*, the surplus—and the adequacy of the fund—would no longer be based upon four times 2.7 per cent of total taxable pay-rolls, but would vary from year to year depending upon how much experience rating credit had been issued for each preceding credit year.

Appellants felt that only by maintaining in the fund a reserve based from year to year on a fixed and unvarying *percentage of total pay rolls* could the express legislative purposes be accomplished and the solvency of the fund adequately protected. It was not without serious thought and consideration that this conclusion was reached. The uncontradicted testimony of John T. McLaughlin, Director of the Unemployment Insurance Division of the Commission, shows clearly that when the legislature enacted the experience rating provisions of the Territorial statute, a determination by the State of New York (whose law on this subject is similar to that of the Territory) of what should constitute a surplus in its relation to a reserve requirement in the unemployment compensation fund, was considered and followed by appellants in preparing for presentation to the Alaska Legislature the experience rating amendments to the Alaska Act. (R. 97-99.) The definition of "surplus" in the New York law (R. 111) shows that surplus depends upon contributions payable upon the *pay rolls reported by employers for the preceding calendar year*; and the "Report of the New York State Joint Legislative Committee on Industrial and Labor Conditions in 1945" (Defendants' Exhibit B; R. 112), which indicates the results of that Committee's studies of the possibility of providing for a rate variation in employers' contributions, expressly recommends to the legislature that when it enacts such legislation, it should keep in mind as a primary consideration, that the amount distributable as surplus should bear a direct relation, not merely to cash contributions, but

to *total pay rolls*—which would be the same as cash plus experience rating credits. On page 53 of this report the Committee stated:

“IV. Unemployment and Health Insurance. Subparagraph 2. Rate Variation * * * Whatever plan is ultimately adopted should be based upon two intrinsic principles which must underlie the application of any system of rate variation.

“The first is that the solvency of the Fund must not be jeopardized. In this connection, the less advantageous economic conditions affecting employment in the postwar period should be taken into account in determining estimates of the Fund’s future solvency. The provisions of several bills introduced in this year’s Legislature meet this test by *requiring a constant reserve of 10.8 per cent of the previous year’s total taxable payroll (equivalent to four times the previous year’s contributions to the Fund).*” (Emphasis supplied.) (R. 112.)

Thus, the legislative history of the New York statute upon which the Territorial Act was based (R. 97-99) supports appellants’ conclusion that contributions should be interpreted as comprising cash plus credits, or 2.7 per cent of total taxable pay rolls. Cf. *Lawson v. Suwanee S.S. Co.*, 336 U.S. 198, 205, 93 L. Ed. 611, 616.

C. LEGISLATIVE OBJECTIVES WILL BE EFFECTUATED ONLY IF THE RESERVE IN THE UNEMPLOYMENT COMPENSATION FUND BEARS A DIRECT RELATION TO THE TOTAL LEVEL OF EMPLOYMENT IN THE TERRITORY.

Appellants' contention that a distributable surplus must depend solely upon total *taxable pay rolls* and not merely upon the amount of cash that employers pay in any one year is the only logical construction to be given to the Act. If a surplus exists only when the total monies in the Fund exceed four times cash contributions plus experience rating credits (i.e. four times 2.7 percent of total *taxable pay rolls*), then when business conditions are good and *pay rolls* are increasing in size and amount, the required reserve in the Fund must also increase before any surplus can be available for distribution as credits. And this is desirable, for when employment rises, there is increased potential unemployment; therefore, the amount of the Fund reserve should increase before any experience rating credits should be allowed. On the other hand, poor business conditions and a consequent decrease in pay rolls will have the necessary effect of reducing the required reserve; and this is entirely reasonable, for although workers will then be drawing benefits in increased numbers, there is no great potential liability being built up. Moreover, in the latter case the reduced reserve requirement could well result in an increased surplus to be distributed as credits, thus assisting in industry's recovery.

Consequently, under this construction of contributions (as comprising both cash and credits), as long as the amount in the Fund reserved for poten-

tial unemployment benefits is 10.8 per cent of total taxable pay rolls (four times 2.7% for the preceding year), it is probably large enough to withstand a large benefit drain caused by a prolonged depression. Such contributions are thus a measure of the potential benefit payments in that figuring on a basis of a constant 10.8 per cent of total taxable pay rolls, they directly reflect the amount of wages payable and the level of employment.

It is evident that the legislature, when it established a system of reduced rates of contributions by means of experience rating credits, intended that the Fund out of which unemployment benefits were to be paid could never be reduced below a minimum point measured by total pay rolls—or the level of employment—in the Territory. And this legislative purpose can be effected only if, in determining surplus, the word “contributions” is construed to include both cash payments and experience rating credits.

**D. THE CONSTRUCTION OF THE ACT URGED BY APPELLEES
WILL DESTROY ESTABLISHED LEGISLATIVE OBJECTIVES.**

In looking at appellees' construction of the Act as it relates to the well defined legislative purposes, an entirely different result is reached—one that could not conceivably have been intended by the legislature. Unlike contributions that consist of both cash and credits, the cash contributions alone are not directly and always related to potential benefit payments since they may be governed, in part, under the appellees'

construction, by the amount of credits issued the preceding year. Thus, the necessity that there be a fixed reserve, bearing a direct relation to the total employment, would be meaningless since under the appellees' system of experience rating, there is not necessarily a relation between cash contributions and potential benefit payments. This is succinctly brought out by appellants' Exhibit C. (R. 120.) There it was assumed that over a period of five years the total level of employment remained unchanged; that is, that the sum of cash payments plus experience rating credits for each of those years would amount to \$2,500,000.00. Assuming further that the amount of money in the Fund would be sufficiently greater than four times the contributions (four times \$2,500,000.00), to allow a surplus to be distributed in the amount of 60 per cent of such contributions, the amount of experience rating credits for the first year, under either appellants' or appellees' computations, would be the same; that is, \$1,500,000.00. But after the first year the difference between the two computations becomes very apparent. Under appellants' construction of the statute, for the second year and each succeeding year, the amount of credits issued would be the same; that is, \$1,500,000.00. Moreover, the reserve (four times contributions, or four times 2.7 per cent of total taxable pay rolls), being the amount in the Fund below which no credits could be issued, would remain constant at \$10,000,000.00. This is as it should be since if the total level of employment remains unchanged, there is no reason for the amount of reserve to change.

Under appellees' theory, however, a very different result is reached. Since only cash contributions determine what should constitute the reserve, four times this amount for the second year would result in a reserve of only \$4,000,000.00, a drop of \$6,000,000.00 from the previous year's reserve. It is difficult to conceive what rational basis there could be for this sudden decrease in the reserve and for the unexplainable fluctuations in subsequent years when at all times the total level of employment remains completely unchanged. If the reserve is a protection against potential unemployment, as it must be, there can be no justification for its changing in amounts during times that potential unemployment remains constant. Obviously, the only explanation for this is that appellees' interpretation of contributions must be erroneous.

Appellees' interpretation appears even less sound when it is considered that under the Act (§51-5-5(c)(2)(G) ACLA 1949) employers need not use their credits in any one quarter, but may distribute them throughout the four quarters of the credit year as they see fit. If, in a hypothetical case, employers held back all of their credits until the last two quarters of the credit year (March 31 and June 30), then, as of the cut-off date of March 15 (§51-5-5(c)(1)(D) ACLA 1949), the amount of contributions for the preceding calendar year, under appellees' theory of contributions as being comprised solely of cash, would be greater than if those employers had not paid their contributions entirely in cash for the two quarters preceding the cut-off date, but had used some of their

credits for that period. It is quite evident, therefore, that employers in thus holding back their credits would, in effect, be controlling the amount of reserve in the Fund since, under appellees' theory, reserve is determined not by total employment, but merely by the amount of cash payments made by employers. Which is more reasonable—that employers determine what shall constitute a reserve in the Fund adequate in amount to meet potential unemployment payments, or that the adequacy of the Fund be always directly related to the total level of employment in the Territory? This question answers itself.

Consequently, it is apparent from the language of the Act, its legislative history, its declared objectives and purposes and the contemporaneous administrative construction placed upon it by those charged with its execution, that the word "contributions" as it is used in the definition of "surplus" in the Alaska Employment Security Law (§51-5-5(c)(1)(G) ACLA 1949) must necessarily be comprised of both cash payments and experience rating credits, and that the opinion of the District Court to the contrary was erroneous.

E. APPELLEES ARE ESTOPPED TO QUESTION THE ADMINISTRATIVE CONSTRUCTION OF THE ACT.

A formidable objection to appellees' interpretation of the Act is apparent when it is considered that they have acquiesced in the administrative construction for previous years. The facts in this respect are alleged in appellants' "Third Defense" of their answers to the

complaint and petition (R. 59, 65). In 1948 and 1949 the credits that were issued to appellees and all others similarly situated were based upon the interpretation of contributions which had been constantly followed by appellants from the time the experience rating amendment to the Act first went into effect (R. 102). It was not until 1950, however, that appellees suddenly decided that those persons charged with the administration of the Act had been wrong in their interpretation all the time. The reason for this sudden change in position, after such previous acquiescence, is apparent. For the credit year July 1, 1949, to June 30, 1950, had the surplus been computed on the basis of cash contributions alone, without consideration being given to experience rating credits, appellees would have suffered a reduced credit for that particular year (R. 123). In other words, appellees for that year acquiesced in the administrative construction to their obvious advantage. But suddenly the situation was not so attractive. For the credit year 1950-1951 the appellants, under the interpretation of the Act that had been followed constantly, found that there was no distributable surplus. Appellees then realized that it was no longer to their advantage to accept the administrative construction, and hence they commenced this suit in an attempt to show that appellants' interpretation of the Act was no longer correct.

Although the lower court dismissed this defense of estoppel with very few words (R. 75), it should have been extremely reluctant to declare appellants' interpretation of the law invalid at the instance of those

who had taken advantage of such interpretation. Appellants are unable to discover any exalted principle of equity that permits one to secure a considerable monetary advantage from one construction of a statute, sanctioned by him, and then when the monetary advantage ceases to exist, to repudiate such construction and allege that it is invalid. By acquiescence in the manner of computing surplus under the Act, both the appellants and appellees have given definite character and effect to this interpretation of the law; and the appellees should not now be allowed, after deriving substantial benefits from such acquiescence, to deny such interpretation and completely reverse their position. Cf. *Hartwell Mills v. Rose*, 61 F. (2d) 441, 444; *Hurley v. Commission*, 257 U.S. 223, 225, 66 L. Ed. 206, 207. The rule, sound and well established, that "the court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits", *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348, 80 L. Ed. 688, 711, should be applicable in a situation like this where the validity of the construction of a statute is involved.

Circuit Judge Hutcheson, writing the decision in *Houston Production Co. v. United States*, 4 Fed. Supp., pp. 716, 717, a case involving income tax, said:

" 'Taxation,' as it has been said many times, is an eminently practical matter (citations). Because it is, it has been generally considered that 'where the government and the taxpayer, by acquiescence in the manner of performing an act, have given a definite character and effect to it, the taxpayer will not be permitted, after deriving

benefits from this acquiescence, to deny this character and effect to it, or to change his position at the government's expense.' "

CONCLUSION.

The primary objective of the Alaska Employment Security Law—to relieve economic insecurity due to unemployment by the systematic accumulation of funds during periods of employment from which benefits can be paid during periods of unemployment—can be achieved only by adherence to the original and constantly followed administrative construction of the statute. Only this construction will permit the maintenance of a reserve in the Unemployment Compensation Fund in an amount which will always be measured directly by the total level of employment in the Territory and thus always adequate to meet such potential unemployment. Appellees' construction, on the other hand, not only is completely unrelated to any conceivable legislative purpose, but will have the deleterious effect of defeating the major objective of the Act. Considering, then, the dominant purpose of the law and the only way in which it can be attained, formalistic canons of statutory construction and the lifeless words of the statute should not be relied upon to the extent that the law will cease to have the beneficial effect for which it was enacted. Moreover, appellees, having acquiesced and sanctioned the administrative interpretation to their financial benefit, should be estopped now to change their posi-

tion and repudiate that interpretation of the law when it suddenly ceases to offer them the advantages that they had previously enjoyed.

It is, therefore, respectfully submitted that the decree of the District Court should be reversed and the case remanded to the District Court for entry of judgment dismissing appellees' petition and complaint.

Dated, May 25, 1951.

Respectfully submitted,

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(Appendices Follow.)

Appendices.



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Appendix A

Chapter 53, Session Laws of Alaska, 1949.

Section 1. The agency named the "Unemployment Compensation Commission of Alaska" as established in Sec. 51-5-10 ACLA 1949 is hereby given the new designation of "Employment Security Commission of Alaska" and shall hereafter be known by said new name.

Section 2. Sec. 51-5-20 ACLA 1949 is hereby amended to read as follows:

Sec. 51-5-20 SHORT TITLE. This Act shall be known and may be cited as the Alaska Employment Security Law.

Section 3. Wherever the words "Unemployment Compensation Commission of Alaska" or "Commission" appear in Secs. 51-5-1 to 51-5-20 inclusive ACLA 1949, same shall be deemed to refer to the "Employment Security Commission of Alaska".

Approved March 19, 1949.

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Appendix B

ALASKA EMPLOYMENT SECURITY LAW.

§§51-5-1—51-5-20, Alaska Compiled Laws Annotated, 1949.

§51-5-1. Definitions. As used in this Act, unless the context clearly requires otherwise—

* * *

(d) “Contributions” means the money payments to the Alaska unemployment compensation fund required by this Act.

* * *

§51-5-5. Contributions.

(a) *Payment.* (1) Contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Act, with respect to wages payable for employment occurring during such calendar year. Such contributions shall become due and be paid by each employer to the Commission for the fund in accordance with such regulation as the Commission may prescribe, and shall not be deducted, in whole or in part, from the wages of individuals in such employer's employ.

(2) In the payment of any contributions, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent.

(b) **RATE OF CONTRIBUTION.** Each employer shall pay contributions equal to the following per-

centages of wages payable by him with respect to employment:

(1) 1.8 per centum with respect to employment during the calendar year 1937;

(2) with respect to employment after December 31, 1937, 2.7 per centum.

(c) "EXPERIENCE RATING CREDITS."

(1) MEANING OF TERMS. As used in this Subsection,

(A) "Computation date" means January first (1st) of any year in which credits are being computed.

(B) "Effective date" means June thirtieth (30th) next following the computation date.

(C) "Credit year" means the four consecutive calendar quarters immediately following the effective date.

(D) "Cut-off date" means March fifteenth (15th) next following the computation date.

(E) "Qualified employer" means *any** employer who was an employing unit and had employment for which remuneration was payable in each of the four consecutive calendar years immediately preceding the computation date and who filed any wage reports *which may have been* required thereon on or before the cut-off date, and has paid all contributions due on or before the effective date, provided however, that no such employer shall be deemed a qualified employer

*Words added to original draft are in italics.

if he has had or has reported no employment for four or more consecutive calendar quarters in such four calendar years, and provided further, that when an employer or prospective employer has acquired all or substantially all the operating assets of another [employer]** *employing unit*, the experience of both during such four calendar years shall be jointly considered for the purpose of determining and establishing the acquiring party's qualification for, and amount of, credit; and the transferring employing unit shall be divested of its experience, *and provided further that to the extent permitted by and in compliance with the requirements of Section 160.2 of the Federal Internal Revenue Code, the Commission may by regulation provide for the fair and equitable allocation of experience with unemployment risk as measured by annual percentage declines in payrolls, to or among two or more employers whose operations have been transferred, joined, combined, merged or consolidated because of governmental regulations limiting a natural product, raw materials, supplies or manpower.*

Notwithstanding the provisions of this subsection, no transfer of experience from a predecessor to a successor employer not previously a qualified employer under this subsection shall be effective if the successor's payroll in the last four completed calendar quarters following the date of the transfer is in excess of \$50,000 and exceeds the predecessor's payroll for

**Words in brackets immediately preceding italics are the words for which italics were substituted.

the last four completed calendar quarters immediately preceding the date of transfer by 300 percent or more, provided, however, that no provision, section, clause or part of this Act shall apply to any acquisition or transfer which is determined by the Commission to have been primarily for the purpose of obtaining a more favorable rate of contribution under this Section.

(F) “Payroll” means all [wages] *remuneration* payable for employment *exclusive of remuneration in excess of three thousand dollars (\$3,000) payable by any one employing unit to an individual during any one calendar year.*

(G) “Surplus” means the lesser of:

(1) That amount by which the moneys in the Unemployment Compensation Trust Fund, as of the cut-off date, exceed four times the amount of contributions paid on or before the cut-off date with respect to the payrolls reported by all employers on or before said cut-off date for the preceding calendar year, or

(2) an amount equal to sixty per cent (60%) of the contributions so paid for the preceding calendar year. No portion of the surplus shall be credited to any employer unless the amount of the surplus is at least ten per cent (10%) of the amount of the contributions paid on the payrolls reported by all employers on or before the cut-off date for the preceding calendar year.

(2) ESTABLISHMENT OF CREDITS. The amount of credit for each qualified employer shall be established in the following manner:

(A) Qualified employers shall be grouped into six credit classes, to be designated as classes 6, 5, 4, 3, 2 and 1, in accordance with the sum of the annual percentage payroll declines in regard to the three consecutive calendar years immediately preceding the computation date, each such percentage to be obtained by dividing any decline of the payroll of a qualified employer in any calendar year from the preceding calendar year by the amount of the payroll in such preceding year, each division being carried out to the fourth decimal place and the remaining fraction, if any, disregarded.

Each qualified employer shall be in the credit class which is listed below on the same horizontal line on which the sum of annual percentage payroll declines of such employer appear.

Sum of Annual Percentage Payroll Declines	Credit Class
Less than 10	6
10 or more but less than 30	5
30 or more but less than 50	4
50 or more but less than 70	3
70 or more but less than 80	2
80 or more	1

(B) A "class weight" shall be assigned to each credit class as follows:

Credit Class	Class Weight
6	6
5	5
4	4
3	3
2	2
1	0

(C) The "class product" shall be obtained by dividing the total of the payrolls for the calendar year immediately preceding the computation date for all qualified employers in the same class by the total of the payrolls of all qualified employers for such year, such division being carried out to the fourth decimal place, and multiplying the quotient by the class weight.

(D) The surplus to be credited to each class shall be the product obtained by dividing the class product for each class by the sum of the class products for all classes and multiplying the quotient by the surplus to be credited to all employers. No portion of the surplus shall be credited to credit class 1.

(E) The "class credit factor" shall be the quotient obtained by dividing that portion of the surplus assigned to any class of qualified employers by the sum of the payrolls of all employers in that class for the calendar year immediately preceding the computation date, such division being carried out to the fourth decimal place and the remaining fraction, if any, disregarded.

(F) That portion of the surplus which is to be credited to any qualified employer is the product obtained by multiplying his taxable payroll in the calendar year immediately preceding the computation date by the class credit factor of his class.

(G) As soon as practicable after the effective date each qualified employer shall be furnished a notice showing the amount of credit to which he is entitled, if any. The amount shown on the notice may be ap-

plied only against contributions which are payable by him on wages payable in the credit year and reported not later than the date prescribed by the Commission for payment of contributions on wages payable in the last quarter of such credit year, except that when an employer or prospective employer has acquired all or substantially all of the operating assets of another employer, any unused portion of the credit of the transferring employer shall be transferred to the acquiring party, provided that the transferring employer has submitted all reports and has paid all contributions and interest due to the date of such acquisition.

The first credit notices shall be effective with the credit year beginning July 1, 1947.

(H) Corrections and Appeals:

(1) Corrections or modifications of an employer's payroll shall not be taken into account for the purpose of an increase of his credit unless such corrections or modifications were established on or before the cut-off date.

(2) Corrections or modifications of an employer's payroll may be taken into account within three years after the cut-off date, for the purpose of a reduction of his credit.

(3) Within one year from the effective date the Commission may reconsider the credit allowed any employer whenever it finds that there has been an error in the computation thereof. When an increase is

due, it shall issue to such employer a supplementary credit notice reflecting the increase in the employer's credit; however, when a credit notice has been issued to an employer whose credit is *reduced*, such notice shall be recalled and a revised notice issued. If the credit shown by the incorrect notice has already been applied in payment of contributions in excess of the correct credit, the employer shall thereupon become liable for payment into the fund of an amount equal to the excess of the credit taken by him over the credit to which he is entitled and such amount shall be deemed and collected as contributions payable under this act.

(4) Increases or reductions of an employer's credit shall not affect the credits established or to be established for any other employer, and shall further not affect any other computation made under this Subsection.

(5) Any employer dissatisfied with the amount of credit shown on his credit notice may file a request for adjustment with the Commission within thirty (30) days of the mailing of such credit notice to an employer, showing wherein the amount of credit may be in error. Should such request for adjustment be denied, the employer, within ten (10) days of the mailing of such notice of denial of adjustment, may file with the Appeal Tribunal a petition for hearing which shall be heard in the same manner as a petition for a denial of refund. The appellate procedure prescribed by this Act for further appeal shall apply to all denials of adjustment.

§51-5-20. * * * *

Declaration of policy: L Ex Sess 1937, ch 4, p 24, states that "as a guide to the interpretation and application of this Act, the public policy of this Territory is declared to be as follows:

"Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this Territory. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be accomplished by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment from which benefits may be paid for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this Territory, require the enactment of this measure, under the police power of the Territory, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

* * * * *

¹Appendix C

ALASKA EMPLOYMENT SECURITY LAW.

§§ 51-5-14(f) and 51-5-7(h) & (i), Alaska Compiled
Laws Annotated, 1949

(Administrative Procedure)

§ 51-5-14. Collection of contributions.

* * *

(f) ADJUSTMENTS OR REFUNDS. No later than two years after the date any contributions or interest have been paid, an employer who has paid such contributions or interest may file with the Commission a petition in writing for an adjustment thereof in connection with subsequent contribution payments, or for a refund thereof when such adjustment cannot be made. If the Commission upon an ex parte consideration shall determine that such contributions or interest, or portion thereof, were erroneously collected, he shall allow such employer to make an adjustment thereof without interest in connection with subsequent contribution payments by him, or if such adjustment cannot be made the Commission shall refund said amount without interest from the fund. For like causes and within the same period, adjustment or refund may be made on the Commission's own initiative. If the Commission finds that upon ex parte consideration it cannot readily determine, that such adjustment or refund should be allowed, it shall deny such application and notify the employer in writing. Within thirty days after such notification

shall have been mailed or delivered to such employer, whichever is the earlier, the employer may file a petition in writing with the Commission for a hearing thereof: Provided, that this right shall not apply in those cases in which assessments have been appealed from and have become final as provided in section 14(e) [§ 51-5-14(e) herein]. The petition shall set forth the reasons why such hearing should be granted and the amount which the petitioner believes should be adjusted or refunded. If no such petition be filed within said thirty days, the determination of the Commission as stated in said notice shall be final. The petition for refund shall be heard by the District Court.

§ 51-5-7. Claims for benefits.

* * *

(h) **APPEAL TO COURTS.** Any decision of the Commission in the absence of an appeal therefrom as herein provided shall become final thirty days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his administrative remedies as provided by this Act. The Commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by any qualified attorney employed by the Commission and designated by it for that purpose, or at the Commission's request by the Attorney General.

(i) **COURT REVIEW.** Within thirty days after the decision of the Commission has become final, any

party aggrieved thereby may secure judicial review thereof by commencing an action in the United States District Court against the Commission for the review of such decision, in which action any other party to the proceeding before the Commission shall be made a defendant. In such action, a petition which need not be verified, but which shall state the grounds upon which a review is sought, shall be served upon the Commission, or upon such person as the Commission may designate and such service shall be deemed completed service on all parties, but there shall be left with the party so served as many copies of the petition as there are defendants and the Commission shall forthwith mail one such copy to each such defendant. With its answer, the Commission, shall certify and file with said Court all documents and papers and a transcript of all testimony taken in the matter, together with the Commission's findings of fact and decision therein. The Commission may also, in its discretion, certify to such court questions of law involved in any decision. In any judicial proceeding under this Section, the findings of the Commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said Court shall be confined to questions of law. Such actions, and the questions so certified, shall be heard in a summary manner and shall be given precedence over all other civil cases except cases arising under the Workmen's Compensation Law of this Territory. An appeal may be taken from the decision of the United States District Court as is pro-

vided in civil cases. It shall not be necessary, in any judicial proceeding under this Section, to enter exceptions to the rulings of the Commission and no bond shall be required for entering such appeal. Upon the final determination of such judicial proceeding the Commission shall enter an order in accordance with such determination. A petition for judicial review shall not act as a supersedeas or stay unless the Commission shall so order.

No. 12,872

IN THE

United States Court of Appeals
For the Ninth Circuit

GEORGE VAARA, ANTHONY ZORICH, RALPH
J. RIVERS, as the Employment Security
Commission of Alaska, and R. E.
SHELDON, Director and Chief Execu-
tive Thereof,

Appellants,

vs.

NEW ENGLAND FISH COMPANY, a Corpo-
ration, and WARDS COVE PACKING COM-
PANY, a Corporation, for Themselves
and All Others Similarly Situated,

Appellees.

Upon Appeal from the District Court
for the Territory of Alaska,
Division Number One.

BRIEF FOR APPELLEES.

FAULKNER, BANFIELD & BOOCHEVER,
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Juneau, Alaska,

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CLERK

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and All Others Similarly Situated,

Appellees.

Upon Appeal from the District Court
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Division Number One.

BRIEF FOR APPELLEES.

JURISDICTION.

This is a suit brought for a mandatory injunction directed to the defendants as the Employment Security Commission of Alaska and the Director and Chief Executive thereof, for the purpose of command-

ing them to compute and assign to plaintiffs and all others similarly situated certain credits due them under the provisions of Chapter 74, Session Laws of Alaska 1947 (Section 51-5-5 ACLA 1949), and to permit plaintiffs and all others similarly situated to reduce the amount of cash contributions otherwise required to be paid to the defendants-appellants for the credit year beginning July 1, 1950, and ending June 30, 1951. The case was consolidated with another suit in the nature of a petition for review of a decision of the Employment Security Commission of Alaska. The jurisdiction of the District Court was invoked under the Act of June 6, 1900, Chapter 786, Section 4; 31 Stat. 322 as amended; 48 U.S.C.A. Section 101. The jurisdiction of this Court rests on Section 1291 of the new Federal Judicial Code.

STATEMENT.

In this case the plaintiffs in the lower Court filed a complaint for injunctive relief (R. 3-10), and they also filed petition for review of decision of the Employment Security Commission of Alaska (R. 22 to 52). The answers were filed by defendants to both the complaint and the petition (R. 54 to 67). These two causes were numbered 6356-A and 6377-A, and since the issue was the same in both cases, the Court ordered them to be consolidated for hearing (R. 69-70). The case involves an interpretation of certain language contained in the Alaska Employment Security Law, which is found in Chapter 5, Title 51,

Sections 51-5-1 to 51-5-20 ACLA 1949 inclusive, and the amendment to 51-5-20, which is contained in Chapter 53 SLA 1949. This law of 1949, however, simply changed the name of the Commission from Unemployment Compensation Commission of Alaska to Employment Security Commission of Alaska. That part of the law which is involved in this case is found in Section 51-5-5 ACLA 1949, and particularly in that portion thereof found in Subsection (G) defining surplus. The issue is simple, and there is nothing involved except an interpretation of the definition of surplus.

The Act of the legislature of 1947, Chapter 74, SLA 1947, which is found in Sections 51-5-5 and 51-5-6 ACLA 1949, sets up a system of experience rating credits such as those in existence in nearly every state in the Union. Before the enactment of the experience rating credit law of 1947 the employers in Alaska paid into the Unemployment Compensation Fund 2.7% of their payrolls and under the Federal Social Security Law they paid .3% to the Federal Government, making a total of 3%. The amendment of 1947 setting up the experience rating system provides for certain credits to be given employers against this tax of 2.7%, and these credits are based on the employment experience of the employer, or in other words, the credits were set up on what is known as the payroll decline system. Employers are divided into six classes (see Section 51-5-5 ACLA 1949) and their credits against the payment of the full contributions are based upon their employment record. The

better the record or the more constant the payroll, the greater is the credit.

Credits are given only when there is a surplus in the Unemployment Trust Fund. March 15 of each calendar year is known as "cut-off date" and the surplus is defined in Paragraph (G), Subsections (1) and (2) Section 51-5-5 as follows:

"(G) 'Surplus' means the lesser of:

"(1) That amount by which the moneys in the Unemployment Compensation Trust Fund, as of the cut-off date, exceed four times the amount of contributions paid on or before the cut-off date with respect to the payrolls reported by all employers on or before said cut-off date for the preceding calendar year, or

"(2) an amount equal to sixty per cent (60%) of the contributions so paid for the preceding calendar year. No portion of the surplus shall be credited to any employer unless the amount of the surplus is at least ten per cent (10%) of the amount of the contributions paid on the payrolls reported by all employers on or before the cut-off date for the preceding calendar year."

Following this portion of the Act is the formula for the establishment of credits.

It will be seen then that there would be available for credits during the credit year beginning July 1, 1950, either

(a) the amount by which the moneys in the Unemployment Compensation Trust Fund on March 15,

1950, exceeded four times the amount of contributions paid during the calendar year 1949; or

(b) an amount equal to 60% of the contributions so paid for the calendar year 1949.

The amount of the credits to be computed and assigned to employers would be the lesser of these two amounts. The Commission in determining whether credits were to be assigned or whether any credits were available, instead of multiplying by four the amount of contributions paid during the calendar year 1949, multiplied by four the contributions paid plus the credits which had been given to employers during the calendar year 1949. The plaintiffs in the lower Court, the appellees here, contended that the credits given employers in 1949 should not have been included in computing the surplus for the year beginning July 1, 1950, and if they had not been included, there would have been a surplus available for credits during the credit year beginning July 1, 1950. The appellees applied to the Commission to change its interpretation and to assign the credits to employers based on a computation of the surplus at four times the amount of contributions actually paid to the Trust Fund in the calendar year 1949 without taking into consideration any credits given employers during that calendar year. The Commission declined, and, after all steps had been taken by plaintiffs to exhaust such administrative remedies as are provided, the petition for review was filed in the District Court, Cause No. 6377-A (R. 11 to 52) and this was consoli-

dated with the complaint for injunction (R. 69-70). The District Court in its opinion found that the Commission was in error in including the credits for the year 1949 in the sum which it multiplied by four in order to arrive at the surplus available for credits, and it held that the amount to be multiplied by four should have been only the contributions paid during the calendar year 1949 (R. 70 to 75). Findings of Fact and Conclusions of Law were entered on January 18, 1951 (R. 76 to 84), and Judgment and Decree, based on the Findings and Conclusions, was entered on the same day (R. 85 to 87), and the Court enjoined the Commission from collecting from the plaintiffs and all others similarly situated contributions required to be paid for the credit year beginning July 1, 1950, in excess of 2.7% of their payrolls, less the credits provided to be allowed employers under the provisions of Section 51-5-5 ACIA 1949, and ordered the Commission to recompute the credits due in accordance with the Court's Findings, and to assign them to employers to be used during the current credit year.

It was admitted by defendants-appellants and found by the Court that the amount in the Trust Fund as of March 15, 1950, the cut-off date, was \$9,397,-006.93, and that the amount of contributions actually paid by employers during the calendar year 1949 was \$1,370,519.14. The Court found that by multiplying this sum, \$1,370,519.14, by four, the result is \$5,482,-076.56, and there was a surplus available for credits during the credit year 1950 of \$3,914,930.36 (R. 80),

or the difference between \$5,482,076.56 and \$9,397,006.93. However, under the provisions of Subdivision (G) Section 51-5-5 ACLA 1949, the portion of this surplus which could be assigned for credits was limited to 60% of \$1,370,519.14, or a total of \$822,311.48 (Finding No. XII, R. 82). The Decree ordered the Commission to compute and assign credits to that extent to all employers in accordance with their respective classifications (R. 87).

It might be mentioned that before the Judgment was entered, employers had continued to pay into the fund their full contributions at the rate of 2.7% without having received any credits, and they have continued to do that for two reasons: first, because they had no means of knowing their individual credits, which must be computed by the Commission; and second, the Court on March 14, 1951, entered an order impounding all funds coming into the hands of the Commission pending the appeal, and it ordered all employers to continue to pay into the fund at the full rate of 2.7% until the case is disposed of by this Court. This matter of impounding the funds pending appeal was before this Court on April 2, 1951, on the motion of appellants for leave to prosecute the appeal without bond or without security to the plaintiffs and all others similarly situated.

ARGUMENT.

As we have said in our Statement, the issue in this case is simple. All facts involved are admitted in the pleadings and by stipulation. No questions are raised as to procedure. The sole question is one of law, and it is whether, in computing the surplus for the purpose of determining the amount of credits to be assigned to employers for the credit year beginning July 1, 1950, the appellants were in error when they included the credits with the contributions paid in 1949; added the two together and multiplied the result by four.

The original Unemployment Compensation law of Alaska is found in Chapter 37, Laws of Extraordinary Session, 1937. There have been several amendments at subsequent sessions of the legislature, including the amendment contained in Chapter 47, SLA 1947, setting up experience rating credits. These are all carried into the 1949 compilation and set forth in Chapter 5, Title 51 ACLA 1949, commencing with Section 51-5-1. This section defines "contributions" as follows:

"As used in this Act, unless the context clearly requires otherwise * * * (d) 'contributions' means the money payments to the Alaska Unemployment Compensation fund required by this Act."

Credits are assignable each credit year, which begins on July 1, from the surplus in the fund, as it stands on March 15, the cut-off date, and these cred-

its are measured by the amount of the surplus. If there is no surplus, no credits are due. If the surplus exceeds four times the amount of contributions paid by all employers during the preceding calendar year, the excess, or 60% of all contributions paid, whichever is less, is to be the amount of credits assigned to all employers (Section 51-5-5 ACLA 1949 *supra*).

At the "cut-off date" for the credit year beginning July 1, 1950, there was in the fund \$9,397,006.93. The total of contributions paid in 1949 was \$1,370,519.14. If we multiply the latter sum by four, the result is \$5,482,076.56. Therefore, we have a surplus of \$9,397,006.93 less \$5,482,076.56, or \$3,914,930.37 (R. 79). Appellees contend that based on that surplus, credits should have been assigned equal to 60% of \$1,370,519.14 or \$822,311.48, and that was the order of the District Court in its Judgment.

Appellants say that the credits assigned or used during the calendar year 1949 amounted to \$1,016,413.49. Adding that sum to the amount of contributions paid of \$1,370,519.14, we get \$2,386,932.63, and that is the sum appellants multiplied by four, obtaining a figure of \$9,547,730.52, which exceeds the entire amount of \$9,397,006.93 in the fund at the cut-off date. By that method the credits for the current credit year were omitted.

The figure which the law requires to be multiplied by four is "*contributions paid*" during the preceding calendar year. There is no ambiguity about that and no room for judicial interpretation. The same law

defines "contributions" as "*money payments*" to the fund. (*Italics supplied.*) That phrase is equally plain. Therefore, the law means that in computing surplus for the purpose of assigning credits, the Commission must multiply the money payments of the preceding year by four, and not the money payments plus the credits.

Credits are not in any sense contributions. They are not something the employer contributes, but something he receives. Actually, it is something which he has contributed in past years to build up the fund and a portion of which he is now receiving back because of his good employment record and steady payroll.

Furthermore, since that part of the law defining surplus refers three times to "contributions paid" for the preceding calendar year, the Commission was not given any discretion to add something else. Credits could not, by any stretch of the imagination, be considered as money payments. The plain meaning of the law is that employers who have more or less steady employment with a payroll that does not fluctuate or decline, are required to pay less into the fund than if the employer has a fluctuating payroll and is, therefore, responsible for periods of unemployment of his employees. His credit is based on the percentage of the decline in his payroll as worked out in the formula set forth in the law. It is not anything which he pays during the year. It is something which he receives.

It will be noted that the credit year and the calendar year are not the same, for the credit year extends from July 1 of one calendar year to June 30 of the next.

If the credits are to be added to the "contributions paid" for the calendar year, then what credits are they? They would necessarily have to be either the credits assigned on July 1 for use within part of two calendar years or else just those credits which were used during the calendar year involved. It would not do to use the credits assigned on July 1, for frequently these are not all used by all employers, as some employers cease business before the end of the credit year, and if they could be considered payments, they are not all used or paid within that calendar year.

On the other hand, if we use the credits actually applied during the calendar year in question, we are using credits, part of which had already been assigned the year before.

Therefore, if the Commission's theory is correct, it must deal in computing the surplus on that theory with two calendar years and not just with the "preceding calendar year" as provided by law.

If the legislature had intended to include credits in computing the surplus, it would surely have been credits actually applied and used during the preceding calendar year, part of which had been assigned before that calendar year began. That result could have been accomplished very simply by stating in

the law that the computation of the surplus for the purpose of assigning credits should be done by multiplying the total of all taxable payrolls for the preceding calendar year by 2.7%. What they said, however, was something entirely different when they used the words "contributions paid" * * * for the "preceding year".

The credits are simply a deduction from the amount which the employer would otherwise have to pay, and Subdivision (G) of Section 51-5-5 ACLA 1949 provides that these credits may be used only during the credit year for which they were assigned and only by the employer to whom they were assigned, except that when an employer sells his operating assets, the purchaser who succeeds him in business under certain circumstances may use the credits during the credit year. It would seem, therefore, to be highly absurd to consider these credits as "money payments". It will be observed that the law provides that an employer, to be qualified, must have been an employing unit and had employment for which remuneration was payable in each of the four consecutive calendar years immediately preceding the computation date (Subdivision (E) Section 51-5-5 ACLA 1949).

Even if by any possible construction a credit, as set up in this law, could be considered a contribution paid and a payment made in money, still it would be impossible to hold that this credit was paid during the preceding calendar year. It was something that was already there and which had been accumulating

over a period of many years, for in computing the credit the experience of the employer must be taken into consideration for three years, and he gets no credit unless he has been an employer for four years.

If the legislature had intended that the required surplus should be computed as four times the contributions paid during the preceding year plus the credits assigned for that year, based on the fund accumulated during prior years, it could have easily said so, but the definition of "contributions" as "money payments" stands unqualified in the law, and when the law was amended in 1947 to set up the experience rating credit system, not only did the legislature use the word "contributions", but it used the words "contributions paid" in prescribing the method of computing the required surplus.

A credit is not something paid during the preceding calendar year and it is not a payment at all. It is simply the application of a portion of the surplus in the Trust Fund. Theoretically, it was placed there by the employer and it belongs to the employer under the law in proportion to first, his employment experience rating and second, the total surplus. It is not something which the employer pays into the fund during the preceding calendar year. It is something which he already has. It has no relation to anything paid in money during the preceding calendar year.

We think the District Court completely disposed of appellants' contention in its opinion (R. 70-75) and particularly where the Court states:

“Indeed, it is inconceivable that the legislature left the language stand in the belief that ‘contributions paid’ and ‘money payments’ included credits, for in no sense could it be said that such credits are ‘paid’. This is not a case of an unhappy choice of words of doubtful or vague meaning or the use of terms of art, but rather a case in which the meaning of the language used is clear and certain. Such an omission cannot be supplied by the Court under the guise of construction without encroaching upon the legislative function.” (R. 74.)

ESTOPPEL.

In the third defense set up in appellants’ answer, an estoppel is pleaded. Appellants contend that the method they used in computing the surplus for the purpose of credits for the year beginning July 1, 1950, was the method used by them in the year 1948 and 1949; that is to say, that in those years they based their credits on a computation of the surplus which included both credits and money payments for the preceding calendar year, and that in one of those years that method of computation resulted in giving the plaintiff New England Fish Company a little less credit, and the Wards Cove Packing Company slightly more, and that for the second credit year mentioned, both the plaintiffs’ credit figures on the basis contended for by the plaintiffs-appellees would have been less.

Appellants' argument then is that since the plaintiffs and all others had accepted credits for the years 1948 and 1949 on the same basis as appellants are attempting to use for the year 1950-51, they are now estopped from questioning the method of computation.

However, the District Court in its opinion held that the doctrine of estoppel urged by defendants was not applicable (R. 75). The plaintiffs-appellees have no means of knowing the method of computation employed by the Commission in those two former years. The computation of credits is based on a rather complicated formula which takes into consideration not only the experience rating of the employer, but also the total of all contributions paid during the preceding calendar year. The employer has no notice of the method employed to arrive at his credit. The form of notice used simply gives the credit class of the employer, the class credit factor, the total wages and the amount of the credit.

The credits are simply assigned by the Commission on the form prepared by it, a sample of which is in the record as Defendants' Exhibit No. 1 (R. 132). The employer had no means of knowing the method employed in computation of the surplus. Furthermore, the fact that the Commission had used the wrong method in two previous years is no reason why they should continue to do so, and no estoppel is involved. The Commission is governed by the law and if they departed from its requirements in former

years and made a mistake in its application, that is no reason why they should continue to do so, whether it should be to the advantage or disadvantage of employers.

Appellants introduced at the trial Defendants' Exhibit C (R. 120). This is a hypothetical, or theoretical, computation based on constant contributions at the rate of $2\frac{1}{2}$ million dollars per year. It is rather difficult to understand, but appellants tried to impress upon the lower Court that by following the strict language of the law for the computation of surplus and using cash contributions only as a basis of computation, there would be wide fluctuations in the fund. These fluctuations would apparently not be so great, for in the testimony of Robert Prather, the expert for the Commission, it is shown that the difference in the amount of credits issued for the year ended June 30, 1949, that is, the difference between the employer-contended method and the method actually used by the Commission, was only \$6,603.70 (R. 124). However, we cannot see the applicability of this theory in following the simple language of the statute, for whether fluctuations occur or do not occur would not seem to make any difference where a limit has been placed upon the fund so that when it goes to a certain point, no further credits are assignable.

The theory of the experience rating credit provision of the law is that the legislature places in effect a limit on the Unemployment Compensation Trust Fund and provides that so long as the total amount

in the fund is not below that limit, credits may be assigned to employers in accordance with their experience rating. If the Commission used the wrong method in the two previous years, it might have in some instances assigned greater credits to some employers than should have been assigned, but it is also true that by using the correct method prescribed by law, the employers would receive smaller credits in the future. What the employers are contending for in this case is a correct application of the law, and they ask that the plain and simple language of the statute be applied, regardless of what was done in the past. If a mistake was made, it was done by the Commission, and regardless of that, we are entitled to have the correct credit applied for the current credit year and in the future.

If the law requires a certain thing to be done in a certain way, the fact that it was done in some other way in the past, contrary to law, by one party and accepted by the other party, even if he had full knowledge of it, would not at all justify a continuance of the wrongful application of the law. The doctrine of estoppel has never been applied in such a case.

Appellants, in their brief cite the following cases dealing with estoppel:

Hartwell Mills v. Rose, 61 Fed. (2d) 441;

Hurley v. Commission, 257 U.S. 223;

Ashwander v. Tennessee etc., 297 U.S. 288;

Houston Prod. Co. v. U.S., 4 Fed. Supp. 716.

These cases are not applicable here and do not support the contention of appellant that estoppel applies under the circumstances of this action.

The general rule applicable would seem to be that found in *C.J.S.* vol. 31, page 275, sub. (b) section 72, which reads:

“It is essential to an equitable estoppel that the person asserting the estoppel shall have done or omitted some act or changed his position in reliance upon the representations or conduct of the person sought to be estopped. A change of position which will fulfill this element of estoppel must be actual, substantial and justified.”

None of these elements are present in this case. Here there was no knowledge on the part of appellees as to the method used in computing credits in 1948 and 1949. It was in April, 1950, that appellants notified all employers that no credits would be available for the credit year beginning July 1, 1950. This was done by a bulletin and order (Finding No. VI, R. 79). It was then that appellees were first put on sufficient notice to inquire as to the method being used to compute surplus.

All the cases cited by appellants deal with estoppel as affecting a single transaction. Here each credit year stands by itself and we are dealing with the credit year beginning July 1st, 1950. The position taken by the appellants is that because they made a mistake in 1948 and 1949 they must make another one in 1950 and all future years. What was done by

appellants in 1948 and 1949 has no bearing in 1950 which is a separate year. We are now dealing with 1950 and future credit years and it may well be that if the cash contributions for 1950 are sufficiently large the amount of the credits for the credit year beginning July 1st, 1951, will be smaller under our interpretation of the law than under the appellants' interpretation.

None of the elements of estoppel are present in this case. The appellee knew nothing of the basis of appellants' method of computation in 1948 and 1949; they did not induce the appellants to do anything; they were not induced to change their position in any respect much less to change it and do something they would not have done except for the acts or conduct of appellees.

THE NEW YORK LAW.

There are no Court decisions on the point involved in this case for the reason that the Alaska law is quite different from the law of any other state with respect to a definition of "contributions" and the definition of "surplus", except perhaps the Washington law. The law of that state, however, has recently been amended so as to provide that in computing surplus the Commission shall take into consideration and multiply by four not only the cash contributions for the previous year, but the credits given during the previous year.

In the record we find a reference to the New York Act and defendants introduced Exhibit A (R. 111) which is Section 577(d) of the New York Act. Just what bearing this has on the case before the Court it is difficult to see, and apparently counsel was making reference to the New York Act to show how the surplus is safeguarded by the terms of the law of that state. However, the Alaska law does the same thing and the legislature provided for protecting the surplus by ordaining that no credits should be issued to employers unless there was a certain amount of surplus in the Unemployment Trust Fund. When the surplus falls below a certain point, no further credits are given, so that the fund is fully protected.

Section 577(d) of the New York Act is the section dealing with the definition of surplus, and it reads as follows:

“(d) ‘Surplus’ means that amount by which the moneys in the fund as of the effective date, after subtracting the amount of credits previously established under this section and outstanding as valid on such date, exceed the lesser of nine hundred million dollars or three and one-half times the amount of contributions payable on the payrolls reported by all employers on or before the effective date for the preceding completed calendar year, limited, however, to an amount not greater than sixty per centum of such contributions for such year.”

This is quite different from the Alaska Act, for that law takes into consideration the credits pre-

viously established under Section 577. There is a great difference between the definition of "contributions" in the Alaska Act and in the New York Act. In the Alaska Act "contributions" is defined as "the money payments to the Alaska Unemployment Compensation Fund required by this Act". The definition of "contributions" in the New York law is found in Section 570, subdivision 1, which reads as follows:

"§ 570. Payment of Contributions. 1. Rate. Each employer liable under this article shall pay regularly contributions in an amount equal to two and seven-tenths per centum of his payroll."

It will be seen, therefore, that not only is the definition of contributions different in the New York Act, but the definitions of surplus and the basis for the credits are different. The New York law, Section 570, defines "contributions" as a flat 2.7% of the payroll. Section 577, in defining "surplus", provides that in making the computation there shall first be subtracted the amount of credits previously established and outstanding as valid on the effective date, which is September 30, and then the amount which is multiplied by $3\frac{1}{2}$ is the amount of "contributions payable on the payrolls reported by all employers on or before the effective date for the preceding completed calendar year, limited, however, to an amount not greater than sixty per centum of such contributions for such year."

The difference, then, is that not only does the New York law have a different definition of contributions, but the portion of it which deals with surplus instead

of using the term "contributions paid" as in the Alaska Act, uses the words "contributions payable", and the New York Act provides first for subtracting the amount of credits previously established. However, we do not know how the New York Act is administered, but apparently there has been no difficulty, for there seems to be no Court decisions involving a similar issue to the one in this case.

It is significant that counsel for the defendants stated to the trial court as follows, in answer to a question:

"Mr. Dimond. Well, I think the testimony shows that the New York statute was studied in connection with the drafting of the Alaska law, and at least some of the Alaska law is very similar, and the thinking of the New York committee on the intent of its law should have the inference as to showing that the people who drafted the Alaska law were thinking along the same line, the fact that contributions have reference to the total, and I believe that is shown in the Joint Committee Report in 1945, and also the definition of surplus in the New York Statute itself."

It may well be that the legislature, in drafting the Alaska law, studied the New York law and many others, and the reports of committees making recommendations, but they drafted their own law and used their own language, and that is the language which is here for interpretation and not something which was omitted. It would seem that if the Alaska legislature had studied the New York law and the reports

of the legislative committees of that state and then drafted a different law, there would be no reason for going beyond that in seeking the intent of the Alaska legislature, although as stated in the trial Court's opinion, "the language employed leaves no room for construction because there is nothing to construe" (R. 73).

We have cited no authorities, for as stated hereinabove, we find no precedent for the interpretation of the Commission.

The word "contributions" is defined in the Act. We do not need even the authority of a dictionary. The method of computing the surplus is set forth in plain and simple language.

ADMINISTRATIVE INTERPRETATION.

We know that administrative interpretations, where permitted, are sometimes given considerable weight in the courts, but here, as the trial Court says, there was nothing to interpret. There are acts of Congress and of the legislatures, the administration of which are entrusted to boards and administrators, and in many cases these laws are of such character as to require certain rules, regulations, and sometimes interpretations. Such a law is the Wage-Hour Act, but interpretations of an administrator are never binding on the courts. (*Fleming v. A. H. Belo Corp.*, 121 Fed. (2d), p. 207.) There the Circuit Court of Appeals for the Fifth Circuit cites authorities dealing

with this question of the binding nature of an interpretation of an administrator and the following language is used:

“For us to agree that such interpretations are binding on us would require us to entertain the view, the contrary of that uniformly taken both by Congress and the courts, that law as well as facts should be and has been delegated to the administrator.”

This case was affirmed by the Supreme Court of the United States in *Walling v. A. H. Belo Corp.*, 316 U.S. 624.

The Employment Security law of Alaska does not give the Commission the power to make interpretations of the provisions of the Act. Section 51-5-11(e) gives the Commission the power to make rules, but these rules are simply rules for the enforcement or the administration of the Act in accordance with its terms and in the application of the language employed. Furthermore, such rules and regulations can be made only after thirty days' notice and no such rule is cited by appellants as authority for the interpretation they have placed upon the definition of surplus or for the definition they have adopted of the word “contributions” in the face of that expressed in the law itself.

Appellants can find no authority under any theory advanced by them which supports the right of the Commission or its director to make an “administrative interpretation”, which results in a change of

meaning of a word in a statute which not only has a common and universally accepted meaning, but the definition of which is clearly set forth in the statute. Such "administrative interpretation" has probably never before been attempted, much less upheld by the courts.

CONCLUSION.

Appellants, in their brief, argue in effect that the spirit, purpose and intent of the legislature must prevail over the plain, simple, unambiguous and definite language of the statute. We do not think there is any merit in such argument. Statutes are not so interpreted by the courts for two reasons: *First*: the primary rule of construction is that

"The intention of the legislature is to be obtained primarily from the language used in the statute. The court must impartially and without bias review the written words of the act, being aided in their interpretation by the canons of construction. Where the language of a statute is plain and unambiguous there is no occasion for construction even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it because of some supposed policy of the law, or because the legislature did not use proper words to ex-

taxpayer, or, at his option used as a credit against the tax for any future year; but it cannot be assigned or used as a medium of exchange.

Then appellants at page 15 of their brief state that obligations may be "paid" otherwise than in money under certain circumstances. It is true that poll taxes in some places, under some circumstances in former years were satisfied or offset by work on the roads, but they are not paid. They are satisfied or offset or cancelled.

Here the language is "money payments" and those payments cannot be offset or satisfied in any other manner than payment in money.

We respectfully urge that the opinion and judgment of the District Court, under the law and on the record, are eminently correct and that the judgment and decree should be affirmed.

Dated, Juneau, Alaska,
June 27, 1951.

Respectfully submitted,
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No. 12874

12874

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES LINES COMPANY, a corporation,

Appellant,

vs.

WILLIAM J. CUMMINGS,

Appellee.

APPELLANT'S REPLY BRIEF.

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No. 12824

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES LINES COMPANY, a corporation,

Appellant,

vs.

WILLIAM J. CUMMINGS,

Appellee.

APPELLANT'S REPLY BRIEF.

The testimony describing the accident is the heart of this dispute and this appeal. (Appellant's Op. Br. pp. 8-14.) Notwithstanding, appellee has not attempted a head-on rebuttal of appellant's appraisal of that testimony. (Appellant's Op. Br. pp. 14-17.) Nor does appellee cite a single page of the record in support of his contention that "substantial," "specific" and "positive" testimony proved that the ladder slipped and dropped two feet. (Appellee's Br. pp. 2, 6, 14, 16, 19, 23.)

Appellee has attacked what he calls appellant's "hypothesis" by setting forth portions of appellee's witnesses' testimony. (Appellee's Br. pp. 2-3.) None of that testimony is reliable. Otherwise, appellee has confined himself to an oblique attack. He has accused appellant of a misleading presentation of the evidence. He has scoured the record to find inconsistencies in the testimony of appel-

lant's witnesses on collateral matters. And in an endeavor to support his case he has been forced to resort to implications and speculation.

By assuming the point in issue—whether or not the ladder slipped—appellee has attempted to make this a *res ipsa loquitur* case. (Appellee's Br. pp. 17-22.) Clearly, it is not.

Appellee has strained to overcome appellant's testimony. He has done this at random throughout his brief. Because appellee has not discussed each point individually, it has been impossible to reply sequentially. Insofar as possible appellant has attempted to arrange its brief to follow the order of appellee's argument.

I.

Appellee Has Failed to Show That the Evidence or Probabilities Support the Decision of the Trial Court.

A. There Is No Competent Evidence to Contradict Appellant's Witnesses Who State That Appellee Stepped on the Ladder While the Pilot Boat Was in a Trough of the Sea.

Appellee has quoted limited passages from the testimony of appellee's witnesses in an attempt to rebut what he refers to as appellant's "theory," "hypothesis," or "explanation of the accident." (Appellee's Br. pp. 2-3.) Appellant has no "theory" or "hypothesis," but relies on and has set forth what appellant contends is the only competent testimony describing the accident. [R. 189, 218, 232, 261.] Appellee has charged appellant of a misleading presentation of the evidence. However, it is to be noted that appellee has failed to quote a single additional word or phrase which actually describes the accident.

Before analyzing appellee's witnesses' testimony set forth on pages 2 and 3 of appellee's brief, we quote O'Brien's testimony on cross-examination [R. 146-147]:

“Q. Were you standing erect or were you sort of crouching down? A. I was usually holding the weight of Captain Cummings, or ready to hold his weight. I was looking directly at the side of the ship.

Q. But what was your stance? Were you crouched or standing erect? A. Oh, I was crouched.

Q. To steady yourself? A. That's right, sir.

Q. How, then, could you tell whether the pilot boat was at the top or the bottom of the swell? A. Well, the pilot would never go on if it wasn't.

Q. I see. Then you don't know, yourself, you just assume he would not step up except on the top of the swell? A. I surely would have noticed if he didn't, sir.

Q. How would you notice? A. Well, it is the usual procedure to go aboard from the top of the swell.

Q. And that is what you base your conclusion on that it was at the top of the swell? A. Yes, sir.

Q. And from nothing that you observed yourself? A. No, sir.”

The striking thing about both Hall's and O'Brien's testimony is that neither of them actually says Cummings stepped off the pilot boat at the crest of the swell. On close examination it is apparent that they were testifying as to usual procedure and not with reference to the particular occasion when Cummings was injured. O'Brien admits this. [R. 146-147.]

Hall states that it is his job to watch when “they” step and only implies that Cummings stepped off on the crest of the swell. [R. 118.] But Hall was obviously not in a position to judge. He was located inside the pilot house and was preoccupied with holding the pilot boat alongside the Princeton Victory. To do this he had to turn half way around to operate the engine room controls, which were located aft of the wheel. [R. 126-127.] Hall could not even see the surface of the water when the pilot boat was alongside the Princeton Victory. [R. 128-129.] Further, he says that O’Brien was between him and Cummings. [R. 127.] This statement is contradicted by O’Brien who testified that at no time did he get between Cummings and Hall. [R. 145.] This error seriously discredits the accuracy of any of Hall’s observations of conditions or events occurring at that time.

Cummings does say he stepped over to the ladder when the pilot boat was at the top of the swell. [R. 54.] He probably thought he stepped when the pilot boat reached the crest, otherwise he would not have stepped. But how can Cummings know? After he stepped he had no way of knowing whether the pilot boat continued to rise or started falling off. He had lost all physical contact and his eyes were squarely fixed where he placed his hands. [R. 105, 106.] He did not wait, as common prudence would dictate, for two or three swells to pass so he could get the feel of the rise and fall of the pilot boat. [R. 52, 104, 105.] Under the circumstances, it is no wonder that he misjudged and stepped too soon.

On page 4 of his brief appellee by means of a warped paraphrase of Hall’s testimony attempts to demonstrate that appellee stepped off at the crest of the swell rather than in the trough. Appellee says in his brief, “As soon

as Captain Cummings dropped, Hall stepped over to him.” What Hall actually said was [R. 118]:

“Q. What, if anything, did you do when you became aware that something was wrong? A. When he dropped, with his legs out of sight, I called the deckhand to take the wheel, and went forward, and his legs were down on the rub rail, and at that time the boat dropped and I got ahold of his hips, to help him, and he told me to back the boat away, and I relayed the order to the deckhand.

Q. You say you got ahold of Captain Cummings’ hips? A. Yes, sir.

Q. Where were his hips with reference to the top of the rail of the Stephen M. White when you did that? A. Well, they was just about, I would say, level with my chest.

Q. With you in what position? A. Standing on the deck of the pilot boat.

Q. With you standing on the deck of the pilot boat, Cummings’ hips would be about chest high on you? A. Yes, with him on the ladder.”

It is clear that Cummings had not changed his position on the ladder. To reach that position he had stepped up twenty-two inches from the deck of the pilot boat to the rail [R. 104, 105], and presumably at least a foot on up to the ladder. This would put Cummings approximately three feet higher than his original position standing on the deck. Hall was standing on the deck when he says Cummings’ hips were level with his chest. Hall states that the pilot boat was at that moment in the trough. Since Cummings would have been in exactly that position had he stepped off while the pilot boat was in a trough, we submit that this circumstance corroborates rather than negatives appellant’s contention.

Appellee would have us believe that the pilot boat obligingly remained poised on the crest of the swell while the following activity took place: Cummings stepped from the rail to the ladder and then fell approximately two feet; thereafter, Hall, realizing the predicament, called the deckhand, made his way from his position inside the pilot house to the deck, then made his way forward to Cummings. *At that time the boat dropped.* This, we submit, is utterly fantastic. Hall could not possibly have done all he did in the brief instant the pilot boat remained on the crest of the swell. During the interval described the pilot boat must have gone from trough to trough. There could be no more convincing proof that Cummings stepped from the pilot boat before she reached the crest of the swell.

B. Probabilities Do Not Establish That Appellant Would Not Step Off the Pilot Boat in the Trough of the Sea.

Appellee would have the court believe that transferring from a small boat to a ship in the open sea is a simple maneuver. (Appellee's Br. p. 4.) On the contrary, Cummings himself testified, transferring is dangerous. [R. 54.] Appellee's analogy to an experienced trainman stepping from a moving train with his back to the locomotive is not a fair comparison. (Appellee's Br. p. 4.) Appellee's example is more analogous to appellee walking off the wrong side of the pilot boat. Obviously, neither event is likely to occur. But experienced trainmen do get injured stepping from moving trains and many experienced seamen have been injured transferring to Jacob's ladders from small boats.

Actually, the state of the sea must not be camouflaged by the use of the word "calm." (Appellee's Br. p. 4.)

Calm is a relative term. Appellee's own witnesses, who were in the best position to judge, state that the swells were two to four and one-half feet high. [R. 87, 115, 122, 139, 147.] Those estimates referred to swells away from the side of the ship. The swell immediately alongside the ship would be even higher. Waves or swells always increase in amplitude when they come up against a solid structure such as a large ship dead in the water or a cliff or breakwater. The water must pile up to an increased height because the obstruction will not move and cannot transmit the wave motion. Hence the potential energy of the wave is released through increased amplitude.

Boarding at sea by a Jacob's ladder is not a simple maneuver. Careful observation, judgment and timing are required. It cannot be performed mechanically or without thinking; not even by an experienced man such as appellee. Any argument favoring appellee's contentions based on probabilities is not effective against the convincing evidence on the record. On the contrary, it is most improbable that Captain Baylis, Chief Officer Kjeldsen, Gallaher and Garcia, all of whom were experienced seamen, and obviously conscious of their duties with respect to the proper rigging of the ladder, would each be so derelict in that duty as to permit it to be slack. As discussed on pages 20 and 21 of appellant's brief, the testimony strongly shows that appellee was negligent and did not take time to evaluate the situation. No attempt has been made in appellee's brief to deny, explain or justify his carelessness.

C. Appellee Has Not Overcome the Direct Testimony Either by Inferences or by Discrediting Appellant's Witnesses.

Throughout appellee's brief the observation is made that "substantial," "specific," and "positive" testimony proved that the ladder slipped and fell two feet. (Appellee's Br. pp. 2, 6, 14, 16, 19, 23.) Appellee's brief has not pointed it out by a single citation to the record. The nearest approach is on page 14 of the brief, when appellee repeats his testimony that, "the rungs played out over the rail." Obviously, in the light of the cross-examination, that statement was a mere conclusion. (Appellant's Op. Br. p. 15.) No motion to strike was made because it did not become apparent until cross-examination that Cummings did not look higher than where his hands grasped the ladder. [R. 105-106.] Even assuming that there were two feet of slack inboard of the rail, and that is most improbable, it is not likely in view of the construction of the ladder that many rungs are going "to play out over the rail." At least not enough that one well below the rail and not looking up would notice it.

Nor does the discussion at page 13 of appellee's brief bolster his conclusion that the ladder slipped. Obviously, the witnesses' observations of the relation of the bottom end of the ladder to the water line were general ones and did not have reference to the moment Cummings stepped on the ladder. In this connection it must be borne in mind that the "water line" varied from second to second by reason of the wave movements and estimates are therefore meaningless unless made in reference to the same stage of the swell. Great stress is placed upon the statement of Captain Baylis that at the time of the accident the bottom of the ladder was approximately two feet from the sea. If appellee insists in placing unwarranted sig-

nificance upon this fact, we say it confirms that there was a trough, not a swell, at the ship's side at the particular moment.

On page 15 of appellee's brief there is an attempt to add credence to his witnesses by the implication that Cummings was referring to slack in the ladder when he said "you had better fix the pilot ladder." That does not give Cummings credit for any seamanlike qualities. It must have been apparent after he had remained on the ladder and climbed it that there was no slack. Cummings obviously was referring to the smashed part of the ladder which would require fixing. Appellee claims that Mr. Kjeldsen admitted this statement but has failed to fully quote his testimony on the point. It is most revealing and speaks for itself. On page 263 of the record Mr. Kjeldsen said:

"A. When we heaved Captain Cummings on the deck we carried him towards the hospital which was a short distance away, and he made a few remarks to the captain of the pilot boat for not pulling away before he was injured and also, when we carried him into the room, he told me to fix the pilot ladder, which I didn't understand until I went out again and pulled it on the deck and found that when he was hit, also two rungs were broken."

Appellee did not deny this statement.

Appellee has attempted to impugn the credibility of appellant's witnesses by pointing out every possible inconsistency in their testimony. (Appellee's Br. pp. 6-12.) These inconsistencies in the main relate to incidental and

collateral matters which in no way affect a determination of the major issues. Inconsistencies of this sort are present in every case. Appellant's witnesses scattered shortly after the accident and long before this suit was filed and did not have the opportunity of "comparing notes." Furthermore, their testimony was taken at widely separated times in advance of trial by deposition. There was no opportunity, as would have been the case had they been present at the trial, to clear up or reconcile possible inconsistencies, if that were necessary. It would be strange, indeed, if under such circumstances these witnesses were not to some extent, inconsistent on minor matters.

Appellee's witnesses, who were in almost constant contact with one another subsequent to the accident and prior to the trial, were also inconsistent on collateral matters. For example, appellee testified that the ladder was rigged at a point 75 to 100 feet forward of the PRINCETON VICTORY's bridge [R. 92-93]; Hall testified that it was within 15 feet forward of the bridge [R. 129], and this is confirmed by all of the other witnesses who testified on this point. [R. 243, 260.] Hall testified that when Cummings stepped upon the ladder his view was blocked by the deckhand who was assisting him [R. 127]; O'Brien, the deckhand, testified that he was standing forward of Captain Cummings, and that he did not at any time get between Cummings and the pilot house. [R. 145.] There are other inconsistencies, but we do not feel that discussion of them is at all helpful to the determination of the important issues. Also, we think it would unnecessarily complicate the discussion to engage in a protracted argument over each of appellee's claimed inconsistencies and we limit our discussion in this connection to a few points.

There is a definite conflict in the testimony with reference to whether the ladder was damaged and raised prior to Cummings' attempt to board the Princeton Victory. But contrary to the implication in appellee's brief, at pages 6 to 7, there is no inconsistency in appellant's witnesses' testimony on this point. The conflict is solely between appellant's and appellee's witnesses. This was pointed out at pages 3 to 4 of appellant's opening brief with full citation of the record. We cannot follow appellee's claim that a denial of these occurrences discredit appellant's witnesses. The physical facts and inferences to be drawn from the testimony on this vital issue are by no means necessarily consistent with appellee's version. If it follows that one set or the other of the witnesses was "fabricating" on this point, we submit that it is much less likely that appellant's witnesses would have had the opportunity to do so than would those testifying for appellee.

We grant that some of Garcia's statements may not be entirely accurate. We think that this is attributable to his obviously excitable Latin temperament. His testimony has a definite ring of sincerity and of all the witnesses produced by either side, he is the least likely to have been influenced in favor of the party producing him. Certainly appellant had no claim upon his loyalty since he was no longer employed by it. The attempt to discredit Garcia by inferring that he did not go down the ladder to assist appellee after the accident is unwarranted. (Appellee's Br. p. 10.) All the witnesses with-

out exception, who testified on the subject, including Cummings, said that Garcia (or a colored man) either reached or went down the ladder some distance to assist Cummings. [R. 216, 237, 262, 282.] In all probability had it not been for Garcia's prompt action, Cummings would have received far more serious injuries.

The attempt on page 11 of appellee's brief to discredit Gallaher by the argument based upon his statement that Cummings "boarded the ship down on the bottom rung of the ladder * * *" is an example of hair-splitting. It completely disregards the testimony that at that time the pilot boat was in a trough which could have put the boat below the ladder. Furthermore, if, as Cummings claims, these two rungs had been damaged by the pilot boat prior to that time, it must logically follow that the boat could have struck that point of the ladder again.

On page 12 of his brief, appellee claims that none of appellant's witnesses could remember *how* the ladder was secured. This is not true. The witnesses knew how it was secured, but expressed some doubt as to *what* the ladder was secured. As pointed out on pages 17 and 18 of the opening brief, Garcia testified positively as to how the ladder was secured. It is understandable that after a long lapse the witnesses could not remember precisely to what object the lashing was secured.

A careful review of the record indicates that of all of the witnesses called by either side, the testimony of Mr. Kjeldsen, the Chief Officer, contains the least number of

contradictions with others. His testimony does not necessarily conflict with that of appellee's witnesses except on the question of whether Cummings stepped off in the trough or at the crest of a swell. During the approach of the pilot boat to the Princeton Victory Mr. Kjeldsen was making his way from his quarters two decks above the main deck to the head of the Jacob's ladder and he probably did not see what transpired close aboard the Princeton Victory during the first approach of the pilot boat. The following testimony by Mr. Kjeldsen is particularly significant [R. 261]:

“Q. Will you describe what happened after this inspection you are speaking of? Will you describe what happened next? What was the next event?
A. After I checked the lines for being made fast securely, I looked over the side again and the pilot boat was alongside and Captain Cummings was about to step up on to the ladder. He stepped on when the pilot boat was in the trough and right after that the swell caused the pilot boat to rise and roll against the side of the ship, and the captain was between the ship and the pilot boat.”

The lapse of the time between the completion of the inspection and the accident must have been most brief. This testimony clearly negatives appellee's inference that the inspection of the ladder on board the Princeton Victory took place prior to the alleged raising and lowering of the ladder and indicates beyond question that the ladder was taut at the time of the accident.

II.

Appellee's Injuries Could Not Possibly Have Resulted From Dropping Two Feet and Wedging His Foot in the Ladder.

On pages 4 to 6 of his brief appellee has committed himself to a theory of the accident that is impossible. As we understand it, appellee contends that his injuries were the result of wedging the toes of his foot between the two parallel rungs forming a step of the ladder after a two foot drop. Doctor Langan, who attended appellee described the injuries at length. [R. 70-74.] All of the toes showed compound fractures. There was a traumatic amputation of the toes and the bone "was just hanging." The skin was evulsed or torn from its attachment in two directions—backward toward the upper leg and down toward the toes. The ankle was swollen and painful. Appellee was in shock and suffering severe pain from the loss of tissue. He was given a hypodermic injection for the relief of his pain. His shoe was torn and damaged. [R. 264.] Surely, such severe injuries could not have resulted from a mere two-foot drop, particularly when part of appellee's weight was supported by his hands which at all times retained their grip upon the ladder. The severity of the injuries is consistent only with the application of a great force—obviously that of the pilot boat coming against the side of the ship.

In arguing on pages 4 to 6 of his brief, appellee has manifested a glaring lack of knowledge of wave motion and the manner in which a boat rides in a swell. For an illuminating but not too technical discussion there is an excellent chapter on waves in *The Oceans*, pages 516-545, by H. V. Svedrup (1946). *Know Your Own Ship:*

A Simple Explanation, pages 244-245, by Thomas Walton (12 Ed. 1921), contains a brief description of how a vessel rides in a sea. The discussion below is based on information contained in these two books.

Appellee argues on page 5 that even if he had stepped off in the trough his foot would have been pushed up and clear by a vertically rising boat. But a boat riding in a long rolling ground swell does not rise and fall absolutely vertically. It tends to surge with the swell. On the front side of the swell, horizontal motion is imparted to the boat in the direction of the swell. The impetus to this motion is the same energy which propels surboard riders. On the back side of a swell the boat falls off and away from the direction of the swell. When a small boat is alongside a ship and not underway this motion can become very pronounced. On this occasion the pilot boat was on the swell side of the Princeton Victory, hence she would tend to move toward the side of the ship as she rose on the swell.

On the front side of the swell the pilot boat would have rolled in toward the Princeton Victory's side exactly as appellant's witnesses described. [R. 215, 232, 261.] The pilot boat would not push the ladder upward as appellee claims, but would pin the ladder and anything else it caught against the side of the ship.

The only plausible way that appellee could have received his injuries was by the pilot boat pinning his toes against the side of the Princeton Victory in the precise manner described by appellant's witnesses. [R. 215, 232, 261.] At the same time that Cummings was injured the pilot ladder was smashed. [R. 186, 218, 234, 263.]

III.

The Doctrine of *Res Ipsa Loquitur* Is Not Applicable
in This Case.

In arguing that *res ipsa loquitur* applies, appellee assumes that the ladder dropped two feet. (Appellee's Br. p. 17.) But that is the crucial fact in this case and appellee's assumption that the ladder did slip is unwarranted. However, regardless of what facts appellee assumes, this case cannot meet the cardinal requirement of a *res ipsa* situation.

Dean Prosser has recently said in his excellent article on "*Res Ipsa Loquitur* in California," 37 Cal. L. Rev. 183 (1949) at 191:

"A *res ipsa loquitur* case is a circumstantial evidence case which permits the jury to infer negligence from the mere occurrence of the accident itself. Its first requirement is a basis of past experience which will permit the triers of fact to conclude that such events do not ordinarily happen unless someone has been negligent."

The cases cited by appellee on pages 17 to 21 of his brief all recognize this requirement.

Experience has shown that the most likely source of accidents during boarding operations at sea is the sea itself. This is recognized by appellee himself. [R. 54.] Negligence of the boarder is almost invariably the co-existing factor producing the accident. Certainly an accident of the sort involved in this action fails to meet the first basic requirement of a *res ipsa* case. A discussion of the other requirements would be superfluous.

If the trial court were justified in finding that the ladder slipped it would create a strong inference of neg-

ligent rigging. We feel most strongly, however, that appellant has affirmatively shown due care and that there is no place whatever for the operation of any inference.

For a court to find that appellant was negligent it must necessarily accept appellee's theory that the ladder was raised and thereafter partially lowered, thereby permitting some slack to remain in the ladder. If this conclusion is reached it most certainly follows that appellee himself was guilty of negligence proximately contributing to his injuries. He maintains that he saw the ladder raised and then lowered. [R. 45, 48.] But he did not thereafter take any action designed to ascertain whether the ladder had been lowered all the way and was secure as ordinary prudence would dictate. He remained in the pilot house until the pilot boat was in position alongside the ladder. [R. 52, 96.] He then walked directly forward and waited just long enough for the pilot boat to raise on a single swell before he stepped on the ladder. [R. 52, 104.] He did not look the ladder over. [R. 50, 105, 106.] Although he claims to have heard O'Brien ask those on deck of the Princeton Victory whether the ladder was fast [R. 51], he made no effort whatever to ascertain whether that alleged inquiry had been answered. Assuming appellee's version of these events to be true, had he taken these normal precautions, the alleged unsafe condition of the ladder would have been ascertained and the accident avoided. Therefore, any recovery appellee might otherwise be entitled to should be defeated or diminished accordingly.

Conclusion.

Nothing which has been said in appellee's brief has in any way contradicted the direct competent evidence indicating: (1) that the ladder did not slip, (2) that appellee stepped off the pilot boat before she reached the crest of the swell, and (3) that the pilot boat rose up on the swell and rolled in on appellee's foot.

Appellee has not produced any direct competent evidence to the contrary. He has talked around the heart of the case and has resorted to elaborate speculation and an attempt to discredit the direct competent testimony of the deposition witnesses.

Rule 52(a) authorizes this court to weigh the evidence and to set aside the trial court's findings if it is convinced that a mistake has been made. We are certain that an objective appraisal of the evidence will leave this court with a definite and firm conviction that a mistake has been made by the trial court.

The judgment appealed from should be reversed and the complaint dismissed with costs in all courts to appellant.

Respectfully submitted,

LILLICK, GEARY & MCHOSE,
L. ROBERT WOOD,
GORDON K. WRIGHT,
LAWRENCE D. BRADLEY, JR.,
Attorneys for Appellant.

No. 12873

United States
Court of Appeals
for the Ninth Circuit.

see vol. 2680

THE PLOMB TOOL COMPANY, a Corporation,
Appellant,
vs.

LIONEL H. SANGER,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

MAY - 20 1905

PAUL E. CHRIEN

CLERK

No. 12873

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Los Angeles 12, Calif.

In the District Court of the United States, Southern District of California, Central Division

No. 10348-WM

LIONEL H. SANGER,

Plaintiff,

vs.

THE PLOMB COMPANY, a Corporation,

Defendant.

COMPLAINT

Now comes the plaintiff, Lionel H. Sanger, by his attorneys, Kenny and Morris, and respectfully alleges as follows:

I.

This is an action brought by plaintiff under Section 7 of the Service Extension Act of 1941 (55 Stat. 628, 50 U.S.C. App. Sec. 357) and Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 890, 50 U.S.C. App. Sec. 308), as amended, and the jurisdiction of this Court is based on the provisions contained in subdivision (e) of said Section 308.

II.

The defendant is a corporation, duly organized and existing under the laws of the State of California, which said corporation maintains a place of business at 2209 Santa Fe Avenue, City of Los Angeles, State of California, and within [2*] the jurisdiction of this Court.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

III.

In November, 1942, the plaintiff entered upon active naval service in the naval forces of the United States and served continuously thereafter in such naval service on active duty to December, 1945, at which time plaintiff was relieved from such training and service and was ordered released from active duty and was given a Certificate of Satisfactory Service, certifying that plaintiff satisfactorily completed his period of training and service in the armed forces of the United States.

IV.

At the time plaintiff entered upon active naval service in the naval forces of the United States, and for many years prior thereto, plaintiff had a position in the employ of defendant as a salesman, and said position was not a temporary one; the plaintiff left this position in November, 1942, in order to perform the military training and service in the armed forces of the United States as hereinabove set forth.

V.

This position plaintiff had in the employ of the defendant as a salesman allowed plaintiff to sell merchandise of the defendant, on a commission basis, in the following territory: the States of Iowa, Kansas and Missouri; Nebraska (east of the extension of the Colorado eastern boundary); the State of Minnesota; the following counties in the State of South Dakota: Brown, Beadle, Sanborn and Bonhemme; and Rock Island, Illinois, and the

plaintiff was also allowed to handle and sell at the same time merchandise of other manufacturers.

VI.

When the plaintiff received his Certificate of Satisfactory Service in December, 1945, he was qualified to perform [3] the duties of such position and still is qualified to perform such duties and at all times herein mentioned has been qualified to perform such duties.

VII.

Within ninety (90) days after plaintiff was relieved, in December, 1945, from such training and service in the naval forces of the United States, the plaintiff made application to the defendant for reemployment, but the defendant failed and refused, and still fails and refuses, to restore plaintiff to his former position or to a position of like seniority, status and pay.

VIII.

Plaintiff is entitled to be restored to his former position, or to a position of like seniority, status and pay, and to compensation for all loss of wages, commissions and benefits suffered by plaintiff by reason of the defendant's unlawful action amounting to Two Hundred Thousand Dollars (\$200,000.00).

Wherefore, plaintiff respectfully prays:

1. That this Honorable Court adjudge and decree that plaintiff was entitled to be restored to his

former position with defendant upon the date of his application therefor, and that he is now entitled to be so restored;

2. That defendant be ordered, directed and required to restore plaintiff to his said position;

3. That the defendant be ordered, directed and required to compensate plaintiff for all loss of wages, commissions and benefits suffered by plaintiff by reason of the defendant's unlawful action amounting to Two Hundred Thousand Dollars (\$200,000.00), and to pay plaintiff's costs; and

4. That the plaintiff have such other and further relief as may be just and proper.

KENNY and MORRIS,

By /s/ ROBERT W. KENNY.

[Endorsed]: Filed September 22, 1949. [4]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Defendant, The Plomb Tool Company, a corporation (sued herein as The Plomb Company, a corporation), for answer to the complaint on file herein, admits, denies and alleges as follows:

1. Admits that the allegations of Paragraph II of said complaint are true with reference to this defendant, The Plomb Tool Company.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in Paragraph III of said complaint to the effect that [5] plaintiff was given a Certificate of Satisfactory Service, certifying that plaintiff satisfactorily completed his period of training and service in the armed forces of the United States. Admits all the other allegations contained in said Paragraph III.

3. Denies each and every allegation contained in Paragraph IV of said complaint. Alleges in this connection that at the time plaintiff entered upon active naval service in the naval forces of the United States, plaintiff was acting as a manufacturer's representative engaged in selling the products of defendant and also the products of various other manufacturers; that as such manufacturer's representative plaintiff was engaged in the sale of defendant's products on a commission basis in a specified territory hereinafter referred to in Paragraph 4 hereof under and pursuant to a certain agreement in writing between plaintiff and defendant; that under and pursuant to said agreement defendant had no right or power to control the means or manner in which plaintiff's selling activities were performed, and that defendant did not exercise any such control; that plaintiff as such manufacturer's representative maintained his own office at his own expense in Kansas City, Missouri, where he conducted business affairs not only in connection with the sale of defendant's products but also in connection with the sale of products of

other manufacturers represented by him; and that plaintiff paid his own expenses in connection with his activities as such manufacturer's representative and in connection therewith hired and paid at least one assistant who was chosen by plaintiff and acted pursuant to plaintiff's directions. Alleges further in this connection that plaintiff's relationship with the defendant, as hereinabove described, was not a [6] position in the employ of defendant within the meaning of Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 890, 50 U.S.C.A. App. Sec. 308), as amended, but that plaintiff's said relationship to defendant constituted that of an independent contractor. Alleges that plaintiff terminated his said relationship with defendant in November, 1942, in order to perform the military training and service in the armed forces of the United States as set forth in said complaint.

4. Denies each and every allegation contained in Paragraph V of said complaint except as hereinafter specifically admitted or alleged. Admits and alleges that in his capacity as a manufacturer's representative hereinabove described in Paragraph 3 hereof, plaintiff was allowed to sell merchandise of defendant on a commission basis in the territory described in said Paragraph V; and that plaintiff also handled and sold at the same time merchandise of other manufacturers.

5. Denies each and every allegation contained in Paragraph VII of said complaint except as hereinafter specifically admitted and alleged. Admits and

alleges that within ninety days after defendant was relieved in December, 1945, from such training and service in the naval forces of the United States, plaintiff made application to defendant for renewal of his status as a manufacturer's representative selling defendant's products as hereinabove described in Paragraph 3 hereof, but defendant failed and refused and still fails and refuses to renew such arrangements with plaintiff. Alleges in this connection that the business of defendant had so increased by the time of plaintiff's said application that it had become [7] and was necessary for defendant to have its products sold through full-time salesmen employed by defendant and handling the sales of no other products than those of defendant and its subsidiary corporations, P & C Hand Forged Tool Company and Penens Corporation; that plaintiff had not at any time handled or sold, either as a manufacturer's representative or otherwise, any products of said subsidiary corporations, or either of them; that at or about such time defendant offered plaintiff a position as an employee of defendant selling exclusively the products of defendant and its subsidiary corporations in the "Chicago territory," which then consisted of the State of Illinois and portions of the States of Indiana, Michigan and Wisconsin, but plaintiff declined to accept such position and refused to relinquish his representation of other manufacturers in the sale of their products.

6. Denies each and every allegation contained

in Paragraph VIII of said complaint and denies specifically that plaintiff has suffered loss of wages, commissions or benefits by reason of defendant's alleged action or otherwise, in the amount of \$200,000, or in any other sum, or at all. Defendant is informed and believes and hence alleges that plaintiff has, since his release from active duty with the armed forces of the United States, acted as a manufacturer's representative in connection with the sale of the products of various other manufacturers and has received for such work wages, commissions and benefits in a substantial sum, the amount of which is unknown to defendant. [8]

As and for Its Affirmative Defenses Herein, Defendant Alleges:

First Defense:

7. The right of action set forth in the complaint did not accrue, if it accrued at all, within three years next before the commencement of this action and said claim is barred by the statute of limitations, to wit, Section 338, Subdivision 1, of the Code of Civil Procedure of the State of California.

Second Defense:

8. The claim attempted to be set forth in the complaint herein is barred by laches and delay on the part of plaintiff to the prejudice of this defendant.

Third Defense:

9. Defendant's circumstances have so changed and had so changed at the time of plaintiff's application for renewal of his status as manufacturer's representative for defendant as to make it unreasonable to restore plaintiff to his former status.

Wherefore defendant prays that plaintiff take nothing and that defendant recover its costs herein incurred.

O'MELVENY & MYERS,

W. B. CARMAN,

SIDNEY H. WALL, and

CLYDE E. TRITT,

By /s/ SIDNEY H. WALL,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 19, 1949. [9]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court, sitting without a jury, on December 19, 1950, and the Court, having considered all the evidence, oral and documentary, and having heard the arguments of counsel for the respective parties, finds

the facts and states the conclusions of law as follows:

Findings of Fact

The Court finds all of the following facts to be true:

I.

This is an action brought by plaintiff under Section 7 of the Service Extension Act of 1941 (55 Stat. 7, 50 U.S.C. App. Sec. 357) and Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 890, 50 U.S.C. App. Sec. 308), as amended, and the jurisdiction of this Court is based on the provisions contained in subdivision (e) of said Section 308. [11]

II.

The defendant is a corporation, duly organized and existing under the laws of the State of California, which said corporation maintains a place of business at 2209 Santa Fe Avenue, City of Los Angeles, State of California, and within the jurisdiction of this Court.

III.

In November, 1942, and for approximately nine years prior thereto, plaintiff was authorized to sell merchandise of defendant on a commission basis as a manufacturer's representative in the following territory: The States of Kansas, Iowa, Minnesota and Missouri; Nebraska (east of the extension of the Colorado eastern boundary); the following counties in the State of South Dakota: Brown,

Beadle, Sanborn and Bonhomme; and the City of Rock Island, Illinois.

IV.

In November, 1942, plaintiff terminated his said relationship with defendant in order to perform military training and service in the armed forces of the United States, and plaintiff thereupon entered upon active naval service in the naval forces of the United States and served continuously thereafter in such naval service on active duty until November 15, 1945, at which time plaintiff was relieved from such training and service and was ordered released from active duty.

V.

On November 15, 1945, plaintiff was placed on inactive duty by the United States Navy with a certificate of satisfactory service, and his terminal leave expired December 29, 1945.

VI.

On or about January 1, 1946, and within ninety days after plaintiff was released from training and service in the naval forces of the United States, plaintiff made application to [12] defendant for renewal of his prewar status selling defendant's products as hereinabove described, but upon such application for reinstatement defendant refused to renew plaintiff's said prewar status.

VII.

Thereafter and during the month of March, 1946,

plaintiff took up with the Selective Service System the matter of his claim for reinstatement with defendant.

VIII.

The Office of the Director of Selective Service for the State of California thereafter conferred and corresponded with defendant during or about the months of August, September and October, 1946, regarding plaintiff's claim for reinstatement, and the defendant refused to renew plaintiff's pre-war status.

IX.

The United States Attorney in Chicago, Illinois, did not file suit against defendant on behalf of plaintiff to enforce plaintiff's claim for reinstatement, and turned the file concerning such claim over to plaintiff in February, 1948.

X.

During or about February, 1948, plaintiff consulted the law firm of Arvey, Hodes and Mantynband, of One La Salle Street, Chicago, Illinois, regarding the plaintiff's claim for reinstatement.

XI.

On or about November 4, 1948, the law firm of O'Melveny and Myers, of 433 South Spring Street, Los Angeles, California, as attorney for defendant, in a letter sent to said firm of Arvey, Hodes and Mantynband, rejected, on behalf of defendant, plaintiff's said claim for reinstatement, and the contents of such letter were made known to the plaintiff on or before December 1, 1948. [13]

XII.

An action was filed by plaintiff against defendant in the United States District Court for the Northern District of Illinois on or about July 22, 1949, to enforce plaintiff's asserted right to reinstatement, which action was dismissed without prejudice on or about September 20, 1949, for want of jurisdiction over defendant in the Northern District of Illinois.

XIII.

This action was brought by plaintiff against defendant in this Court on September 22, 1949.

XIV.

Plaintiff was not guilty of laches by reason of his failure to commence this action sooner than he did. The delay in filing this suit was contributed to by the defendant and the defendant suffered no prejudice by reason of any delay.

XV.

The plaintiff as the result of a defendant's wrongful refusal to reinstate him has suffered a loss of earnings during the calendar year 1946, computed as follows:

1946 gross sales in Kansas City Territory as constituted in 1946 (Pendleton testimony, p. 162, lines 2-10).....\$737,000.00

Average commission rate on gross sales, 12.11%*.

Gross commission at 12.11%..... 89,250.70

Less:

(1) Compensation actually paid by defendant in 1946 to the two men, other than Freund, who were working the above territory (Ex. 49)\$18,443.45

(2) Additional entertainment expense to plaintiff (1/2 of plaintiff's entertainment expense per Ex. L).....\$921.00 19,364.45

Net loss of earnings from Kansas City Territory.....\$69,886.25

1946 gross sales in Minnesota and South Dakota counties of Brown, Beadle, Sanborn and Bonhemme\$208,000.00

Average commission rate on gross sales

(see above) 12.11%*.

Gross commission at 12.11%..... 25,188.80

Less: Compensation actually paid by defendant in 1946 to the two men who were working the above area, at 7 1/2 % rate..... 15,600.00

Net loss of earnings from Minnesota and

South Dakota counties..... 9,588.80

Total Net Loss of Earnings.....\$79,475.05

* Computation of average commission rate on gross sales (1) Plaintiff's 1942 commission rate of 8% on "buy-outs" would have been applicable to 8.53% of 1946 gross sales—.08 x .0853 = .0068. (2) Plaintiff's 1942 commission rate of 12 1/2 % would have been applicable to 91.47% of 1946 gross sales .125 x .9147 = .1143.

Average commission on gross sales = .1211 or 12.11%.

XVI.

During the period from January 1, 1946, to November 30, 1950, plaintiff rendered services to various firms and corporations in the sale of their products and received from said respective firms and corporations as compensation for personal services the amounts set forth in defendant's Exhibit Q, entitled "Sanger Earnings." Plaintiff's gross income, expenses and net profit from personal services during the period from January 1, 1946, to November 30, 1950, were as set forth in said Exhibit Q.

XVII.

All of the factual matters alleged in plaintiff's complaint and in the Pre-Trial Stipulation, and not otherwise specifically found to be true by the foregoing findings, are hereby found to be true. [15]

Conclusions of Law

Upon the Findings of Fact hereinabove set forth, the Court makes the following Conclusions of Law:

I.

Plaintiff left a position in the employ of the defendant within the meaning of the Selective Service Act of 1940, as amended (50 U.S.C. App. Sec. 308b) and that plaintiff's prewar status with the defendant was not that of an independent contractor.

II.

The circumstances of the defendant have not so changed as to make it impossible or unreasonable to restore plaintiff to his prewar status.

III.

On or about January 1, 1946, and at all times thereafter defendant has wrongfully refused to restore plaintiff or offer to restore plaintiff to a position of like seniority, status and pay equivalent to that left by plaintiff to enter the naval service.

IV.

The plaintiff's right of action is not barred by the statute of limitations, to wit, Section 338, Subdivision 1, of the Code of Civil Procedure of the State of California, or at all.

V.

The plaintiff is entitled to recover from defendant as damages the sum of \$79,475.05, together with interest thereon computed at the rate of 7% per annum from January 1, 1947, and less tax withholding and other deductions required by law.

VI.

The plaintiff is entitled to an order directing the defendant within ten days after written notice of entry of judgment herein to reinstate plaintiff to a position as head of [16] sales for the Kansas City territory as it was constituted on January 1, 1951, under such financial arrangements as existed on said date for the then acting head of sales for said territory and under an arrangement whereby plaintiff will devote his entire time to the sale of the products and merchandise of defendant and its subsidiary corporations, P & C Hand Forged Tool Company and Penens Corporation.

VII.

Plaintiff is entitled to an order directing and enjoining defendant not to discharge him without cause from said position as head of sales for the Kansas City territory for a period of one year from the date of his restoration to said position.

VIII.

The Court should retain jurisdiction over the plaintiff and defendant to enforce compliance by the plaintiff and defendant with the terms and provisions of this judgment so that the plaintiff need not resort to any other proceeding in connection with the enforcement of the provisions of the judgment herein.

Dated: This 31st day of January, 1951.

/s/ WM. C. MATHES,
U. S. District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 31, 1951. [17]

In the United States District Court for the Southern District of California, Central Division
No. 10348-WM

LIONEL H. SANGER,

Plaintiff,

vs.

THE PLOMB TOOL COMPANY, a Corporation,
Defendant.

JUDGMENT FOR PLAINTIFF

This cause came on regularly for trial on December 19, 1950, Honorable William C. Mathes, Judge of the above-entitled Court, presiding, plaintiff appearing by his attorneys, Kenny and Morris, Robert W. Kenny and Robert S. Morris, Jr., and the defendant, Plomb Tool Company, Inc., appearing by its attorneys, O'Melveny and Myers, Sidney H. Wall and Clyde E. Tritt, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises and having filed herein its Findings of Fact and Conclusions of Law, having directed that judgment be entered in accordance therewith;

Now, Therefore, by reason of the law and findings aforesaid, It Is Hereby Ordered, Adjudged and Decreed:

1. That the defendant, within 10 days after written notice [19] of entry of judgment herein, employ the plaintiff as its sales manager in the Kansas City territory as it was constituted on January 1, 1951,

and that plaintiff be compensated under the same financial arrangements as existed on said date for the then acting sales manager of said territory, and that the plaintiff devote his entire time to the sale of the products and merchandise of the defendant and its subsidiary corporations, P & C Hand Forged Tool Company and Penens Corporation.

2. That the defendant is hereby enjoined not to discharge the plaintiff from said position without cause for a period of one year from the date of said reinstatement.

3. This Court will retain jurisdiction over the parties for the purpose of enforcing the terms hereof and so that plaintiff need not resort to any other action to enforce the terms of this judgment or any part thereof, or to obtain judgment for such additional sums in the future as may become due.

4. That plaintiff have and recover judgment against the defendant in the aggregate sum of \$102,185.25, less the amount of tax withholding and other deductions required by law to be made by defendant at the time of payment thereof, and for plaintiff's costs of suit herein. Costs taxed at \$17.48.

January 31, 1951.

/s/ WM. C. MATHES,

United States District Judge.

Affidavit of Service by Mail attached.

Judgment entered Feb. 1, 1951.

[Endorsed]: Filed January 31, 1951. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that The Plomb Tool Company, a corporation, defendant above named (named in the complaint herein as "The Plomb Company, a corporation, Defendant"), hereby appeals to The United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on February 1, 1951.

O'MELVENY & MYERS,

SIDNEY H. WALL,

CLYDE E. TRITT,

By /s/ SIDNEY H. WALL,

Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 5, 1951. [22]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON THE APPEAL

Pursuant to Rule 75(d) of the Federal Rules of Civil Procedure, defendant and appellant above named hereby states that the points on which it intends to rely on the appeal from the Judgment entered herein are as follows:

1. Plaintiff's claims for reinstatement and damages are barred by the Statute of Limitations, to wit, Section 338, Subdivision 1 of the Code of Civil Procedure of the State of California; and the Court erred as a matter of law in concluding to the contrary.

2. Plaintiff's claims for reinstatement and damages are [24] barred by laches and delay on his part; and the Court's finding that plaintiff was not guilty of laches is not supported by any substantial evidence and is contrary to the evidence.

3. Plaintiff's pre-war status was that of an independent contractor and hence he is not entitled to reinstatement or damages under the Selective Service and Training Act of 1940, as amended; and the Court erred as a matter of law in concluding that plaintiff left a position in the employ of defendant within the meaning of said Act and that his pre-war status was not that of an independent contractor.

4. Plaintiff is not entitled to the relief granted, even assuming, without conceding, that he left a position in the employ of defendant within the meaning of the Selective Service and Training Act, and that his claim is not wholly barred by the Statute of Limitations or by laches, in that:

(a) Defendant's circumstances had so changed by the time of plaintiff's application for reinstatement as to make it unreasonable, within the meaning of said Act, to require defendant to restore plaintiff to his pre-war status; and the Court erred as a matter of law in concluding to the contrary.

(b) The defendant fully satisfied any obligation it may have had to plaintiff by offering him "a position of like seniority, status and pay" within the meaning of said Act, and his rejection of such offer bars his claims to reinstatement and damages; and the Court erred as a matter of law in concluding to the contrary. [25]

5. Assuming, without conceding, that plaintiff is entitled to any relief, the relief awarded plaintiff is excessive as a matter of law, in that:

(a) By reason of his delay in filing this action, plaintiff is not entitled to recover any damages for loss of earnings for any period prior to the commencement of this action on September 22, 1949; and the Court erred in awarding him damages measured by his loss of earnings during the calendar year 1946.

(b) The Selective Service and Training Act guarantees a veteran only one year's re-employment and it was therefore an error to award plaintiff damages measured by his loss of earnings during the entire calendar year 1946, in addition to ordering defendant to reinstate plaintiff and enjoining defendant not to discharge him without cause for the period of one year

(c) If plaintiff was entitled to any damages measured by loss of earnings for the year 1946.

(i) Such loss of earnings should have been computed on the basis of the commission rate of $7\frac{1}{2}\%$ actually in effect for all defendant's sales representatives during that year; and the

Court erred as a matter of law in computing such loss of earnings on the basis of plaintiff's pre-war commission rates of $12\frac{1}{2}\%$ and $8\frac{1}{2}\%$;

and

(ii) Such loss of earnings should [26] have been computed on the basis of defendant's Kansas City Territory as the same was constituted in 1946; and the Court erred as a matter of law in computing such loss of earnings on the basis of plaintiff's larger pre-war territory.

(d) Any damages awarded plaintiff for loss of earnings are subject to offset for amounts earned by plaintiff in other employment during the same period; and the Court erred as a matter of law in refusing to allow such offset for plaintiff's earnings from personal services rendered to others during the year 1946.

Dated: February 9, 1951.

O'MELVENY & MYERS,

SIDNEY H. WALL,

CLYDE E. TRITT,

By /s/ SIDNEY H. WALL,

Attorneys for Defendant
and Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed February 9, 1951. [27]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL

To the Clerk of the above-entitled Court:

Defendant and appellant above named hereby designates the following portions of the record, proceedings and evidence in the above-entitled action to be contained in the Record on Appeal herein:

1. The Complaint, filed on September 22, 1949.
2. The Answer filed by defendant herein.
3. The Pretrial Stipulation filed September 20, 1950.
4. The Reporter's Transcript of the evidence on file herein.
5. All plaintiff's Exhibits (1 to 51, [29] inclusive) received in evidence or marked for identification, including Exhibits 33 to 47, inclusive, which were received in evidence by reference, respectively, to Exhibits A to O, inclusive, attached to the Affidavit of Lionel H. Sanger filed herein on or about April 10, 1950, and also including the Supplemental Stipulation of Facts dated January 22, 1951, which was approved by the Court, received in evidence as plaintiff's Exhibit 51 and filed herein on January 31, 1951.
6. All defendant's Exhibits (A to U, inclusive) received in evidence or marked for identification.
7. The Reporter's Transcript of the Oral Opin-

ion of the Court rendered on January 9, 1951, which transcript is on file herein.

8. The Findings of Fact and Conclusions of Law.

9. The Judgment for Plaintiff entered herein on February 1, 1951.

10. The Notice of Appeal, showing date of filing.

11. This Designation, as well as any other designations or stipulations of the parties which may be filed subsequently hereto as to the material to be included in the Record on Appeal.

12. The Statement of Points on which appellant intends to rely on appeal.

With reference to designations 4, 5, 6, and 7 above, you are advised that defendant and appellant intends to apply to the above-entitled Court for an order under Rule 75(i) with respect to the transmission of the original papers and exhibits to the Court of Appeals, and will advise if and when such order has been obtained.

Dated: February 9, 1951.

O'MELVENY & MYERS,
SIDNEY H. WALL,
CLYDE E. TRITT,

By /s/ SIDNEY H. WALL,
Attorneys for Defendant
and Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 9, 1951. [30].

In the United States District Court, Southern
District of California, Central Division

Honorable William C. Mathes, Judge Presiding

No. 10348-WM-Civil

LIONEL H. SANGER,

Plaintiff,

vs.

THE PLOMB TOOL COMPANY, a Corporation,
Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Tuesday, December 19, 1950

Appearances:

For the Plaintiff:

KENNY & MORRIS, By

ROBERT W. KENNY, ESQ., and

ROBERT S. MORRIS, ESQ.

For the Defendant:

O'MELVENY & MYERS, By

SIDNEY H. WALL, ESQ., and

CLYDE E. TRIPP, ESQ.

Tuesday, December 19, 1950, 10:00 A.M.

Mr. Kenny: If the court please, Mr. Wall and I have both expressed a desire to make an opening statement to you and if the court has no objection, we will proceed in that manner.

The Court: Very well, you may.

(Opening statements of counsel omitted from transcript.)

Mr. Kenny: We will call Mr. Sanger.

LIONEL H. SANGER

the plaintiff herein, called as a witness in his own behalf, being first sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Lionel Sanger.

The Clerk: Have you any initial?

The Witness: Henry, H.

Direct Examination

By Mr. Kenny:

Q. Where do you live, Mr. Sanger?

A. Chicago, Illinois.

Q. How old are you now? A. 42.

Q. Directing your attention to the year 1932 or to 1933, did you attend the National Automobile Parts Show? In which one of those years was it you attended the National [3*] Automobile Parts Show? A. It was in 1931 or '32.

Q. Before that time had you been in the automobile parts business in any way?

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Lionel H. Sanger.)

A. Yes. I worked for an automobile parts jobber in Chicago that carried Plomb tools.

Q. At the 1932 convention what did you do in respect to Plomb tools?

A. I contacted the Plomb tool representative at that time, who was James Durham, and he told me that he controlled all the midwest territory. At that time the United States was divided into, I think, oh, just approximately three sections, east, west, and midwest, and Mr. Durham had—oh, as I remember, all the states west of Ohio up to Denver, up to Canada, and I believe, south almost as far as Texas. I think Mr. Serp had Texas at that time. And he told me that he wanted to dispose of part of it, although there were no customers there in the midwest area that he spoke of, which was Kansas, Iowa, Nebraska, and Missouri. If I wanted to work that section, he would take me to the salesmanager of The Plomb Tool Company and introduce me. So we went to see Mr. E. D. Moore who was salesmanager.

Q. Salesmanager of Plomb Tool?

A. Yes, sir.

Q. And what did you and Mr. Moore say on that occasion? [4]

A. Mr. Moore—

Mr. Wall: If your Honor please, I wish to object to this line of questioning on the ground that it is irrelevant and immaterial and too remote. This, as I understand it, relates to the year 1932 and the inception of the plaintiff's relationship with the defendant. It seems to me the issue here is the

(Testimony of Lionel H. Sanger.)

character of that relationship at the time when the plaintiff went into the armed services, and this can have no bearing on any of the real issues in the case.

Mr. Kenny: I am not going to take long on it, and I do think that the court will not have a full grasp of the relationship unless we take it from its inception.

The Court: Very well. I will overrule the objection and admit it in evidence.

A. Mr. Moore told me he would hire me and that he would see if he could obtain some financial assistance in the way of other lines, because The Plomb Tool Company was not in a position to add any expense of salesmen. And he took me to Mr. Almendinger in Chicago, who represented lines in the same territory as Mr. Durham, and he made the arrangement where I would get this Wohler line plus a few other small lines to carry me. And that is the reason that I worked for Plomb, where I received no money until about the 15th month, as I remember, I got 82 cents and then the following year about \$300 and went up from there. [4-A]

Q. Will you tell the court what the line of the Wohler Company consists of?

A. Wohler Corporation manufactures parts such as king bolts, fly-wheel gears, pumps, gear heads, and other items in tools.

Mr. Kenny: I am going to offer for identification at this time a table of income and disbursements.

(Testimony of Lionel H. Sanger.)

Mr. Wall: Are you simply offering it for identification?

Mr. Kenny: For identification.

The Clerk: 1 for identification.

The Court: Have the exhibits been numbered which are described in the pre-trial stipulation?

Mr. Kenny: They have not. I propose to introduce the exhibits chronologically. The difficulty with the pre-trial stipulation is that it does not present an orderly sequence. I will present them in exact sequence, and at the time I do I will refer to the pre-trial number so that that will be clear. There are some of them that your Honor may not have seen at all, as a result of recent stipulations.

The Court: Very well.

Q. (By Mr. Kenny): Mr. Sanger, drawing your attention to Exhibit 1 for identification, you received according to that no income from Plomb during the year 1931? A. That is correct.

Mr. Wall: Just a moment. May we have some foundation [5] laid for the series of figures shown on Exhibit 1 for identification, Mr. Kenny?

Mr. Kenny: Mr. Sanger, this exhibit was made up by you and me jointly and separately, was it not, from your income tax returns? A. Yes, sir.

Q. And your books, is that correct?

A. Yes, sir. That shows all the monies received by me since 1933, and in 1931 and '2 I just don't have those, which was the amount that Mr. Almen-dinger paid me when I worked at that time for him.

(Testimony of Lionel H. Sanger.)

Q. In 1933, this table, Exhibit 1, shows that you received from Plomb \$341.42, is that correct?

A. Yes, sir.

Q. And from Wohler \$2,510.69?

A. Yes, sir.

Q. And from Liberty Accessories Corporation \$53.87?

A. Yes, sir.

Q. Did Liberty Accessories sell tools?

A. No, sir; piston expanders.

Q. Piston expanders?

A. Yes, sir.

Q. And from New England Auto Products \$369.93.

A. Yes, sir.

Q. Do they sell tools? [6]

A. Universal joints.

Mr. Wall: If your Honor please, may it be understood that my objection goes to this entire line of inquiry as to the period prior to 1941?

The Court: Yes, it may, and objection overruled.

Mr. Wall: Thank you, your Honor.

Mr. Kenny: Without going over, item by item, I will offer this Plaintiff's Exhibit No. 1 for identification into evidence at this time.

Mr. Wall: That is objected to, your Honor, on the ground that it is incompetent, irrelevant and immaterial insofar as it relates to income or expenses of the plaintiff in any years other than the years 1941 and 1942 which were under the contract in effect at the time of his entry into the Navy, and to the years 1946 and subsequent years since the war period.

I note, if your Honor please, that this includes

(Testimony of Lionel H. Sanger.)

not only figures relating to the period from 1932 to 1940, inclusive, but also relates to figures during the war years of 1943, 1944, and 1945. And I object on the ground of immateriality.

Mr. Kenny: I have discussed the reason for the offer of the other years. The reason for the offer of the years 1943, 1944, and 1945 will become material, because we intend to show that during that time Mr. Sanger was paid by these [7] other lines; that is, while he was at war he was paid commissions by Powell Muffler and Precision Parts and others, and that will become material as bearing on the nature of their closing negotiations when they did break off relationship early in 1946.

The Court: I will sustain the objection at this time to the offer of the exhibit. You may renew it at a later stage of the plaintiff's case.

Mr. Kenny: The reason I offered it at this time is not—I agree with your Honor that we have not connected it up—but merely so the court will have the table, so I won't be developing the table item by item and encumbering the record. And if counsel will let the court examine the exhibit for identification, it will save that much time and we will connect it up later on.

Mr. Wall: May I suggest this, Mr. Kenny: That we have prepared from Mr. Sanger's income tax returns, which you have kindly made available to us, a similar tabulation for the years 1941, 1942, 1946, '47, '48, and '49, which I have no objection to that portion of it, and I would be happy to hand

(Testimony of Lionel H. Sanger.)

you the schedule we have made up on that basis if you would care to use it.

Mr. Kenny: I would like to hand this to the court and we will work from our schedule. Our schedules agree, but this has certain graphic qualities that I would like to have [8] before the court.

Mr. Wall: I certainly have no objection to your Honor looking at the exhibit.

The Court: Very well. I will sustain the objection at this time to the receipt of the document in evidence.

Mr. Kenny: I am now referring to Exhibits 51, 52, and 53 in the Second Supplemental Pre-Trial Stipulation.

Mr. Wall: May I suggest, Mr. Kenny, that we call them "items" of that stipulation?

Mr. Kenny: All right, very good.

Q. Items 51, 52, and 53, and I will ask if you received from Plomb Tool Company this sales report dated January 31, 1938? A. Yes, sir.

Mr. Kenny: We ask that that be introduced as Plaintiff's 2.

Mr. Wall: That is objected to, your Honor, on the grounds that it is incompetent, irrelevant and immaterial, and that no proper foundation has been laid to show the materiality of the document at this time. It purports to be a compilation "Sales Report," dated "January 31, 1938," which is prior to the term of the contract in effect at the time the plaintiff went into the service. It simply designates salesmen's comparative standings, and I think has

(Testimony of Lionel H. Sanger.)

no bearing whatsoever—aside from the time element—has no bearing [9] whatsoever on the question as to whether this man was an independent contractor or an employee.

The word “salesman,” according to Webster, does not mean anything except a man who sells goods, and has no bearing upon his relationship as an employee or an independent contractor.

The Court: Is there any question as to the authenticity of that document?

Mr. Wall: I have stipulated to the authenticity of the document, your Honor.

The Court: Very well, objection will be overruled and it will be received as Plaintiff’s Exhibit 2.

Q. (By Mr. Kenny): In 1938 did you receive a document from Plomb Tool Company headed “Salesmen’s Standing by Dollar Volume”?

A. Yes, sir.

Mr. Kenny: We ask that that be received into evidence as Exhibit 2 (3).

The Court: That is item 52 of the Second Supplemental Pre-Trial Stipulation?

Mr. Kenny: That is correct.

Mr. Wall: I make the same objection, your Honor.

Mr. Kenny: It will be Exhibit 3. I am sorry.

The Court: The objection is overruled. It may be received. [10]

Q. (By Mr. Kenny): On September 29, 1938, did you receive from Plomb Tool Company a general sales letter re condition of your accounts re-

(Testimony of Lionel H. Sanger.)

ceivable, to which is attached a table of Condition of Accounts Receivable? A. Yes, sir.

Mr. Kenny: That is item 53. We ask that that be received into evidence as Exhibit 4.

Mr. Wall: I object on the same grounds, your Honor.

The Court: Overruled.

Mr. Kenny: Item 54, gentlemen.

Q. On October 27, 1938, did you receive from Plomb Tool Company a memorandum two pages in length respecting Third Quarter Sales Report?

A. Yes, sir.

Mr. Kenny: I ask that that be received into evidence as Plaintiff's Exhibit 5.

Mr. Wall: I object to that, your Honor, on the grounds that it is incompetent, irrelevant and immaterial because of the date being in 1938 prior to the contract of employment.

The Court: Overruled.

Q. (By Mr. Kenny): On November 19, 1938—this is item 55, gentlemen—did you receive from Plomb Tool Company a one-page inter-office memo on the subject Third Quarter Sales Report?

A. Yes, sir. [11]

Mr. Kenny: I ask that that be received into evidence as No. 6.

Mr. Wall: I object to that on the same grounds, your Honor, and also because I fail to see anything in the text of the memo which can possibly have any bearing on the issues in this case.

The Court: Overruled.

(Testimony of Lionel H. Sanger.)

Q. (By Mr. Kenny): Now I will show you—this is item 8 in the Pre-Trial Stipulation.

Mr. Wall: Which item?

Mr. Kenny: Item 8.

Q. Did you receive and execute a document, undated, entitled Memorandum of Agreement, the next to the last paragraph of which states:

“This agreement shall remain in force until December 31, 1939,”

and so on? A. Yes, sir, I did.

Q. Can you tell the court when you received it, the circumstances, and when you signed it, if you did?

Mr. Wall: Which item is this? Is this 7 or 8?

Mr. Kenny: This is item 8, the so-called undated agreement.

Mr. Wall: May I see it?

The Court: Item 8 of Schedule of Exhibits attached to [12] the Pre-Trial Stipulation.

Mr. Kenny: That is correct.

The Court: It is understood, then, gentlemen, that when you refer to “items” you are referring to items numbered as in the Schedule of Exhibits attached to the original Pre-Trial Stipulation filed September 20, 1950, or the Supplemental Pre-Trial Stipulation filed September 29, 1950, or the Second Supplemental Pre-Trial Stipulation filed December 19, 1950.

Mr. Kenny: That is correct.

Mr. Wall: Yes, your Honor.

The Court: Very well.

Mr. Kenny: You may answer the question.

(Testimony of Lionel H. Sanger.)

A. I received this in the mail from The Plomb Tool Company as a sales agreement, which was the first one that I recall being issued by the company.

Mr. Wall: Could you speak slightly louder, Mr. Sanger? I have difficulty in hearing you.

A. Yes, sir. I received this as a sales agreement to apply, I believe, for a year. And when it was given to me it was to, as Mr. Moore said—a new gentleman had come in with the firm, Mr. Dillon Stevens, and before signing this I had the pleasure of meeting Mr. Stevens, and it was mentioned that due to social security regulations these contracts were being drawn up and that would save the company—I don't [13] remember the percentage—I believe it was two per cent, and would save us two per cent, save the salesmen two per cent, and it was just a continuation of the way that we worked. There was no change.

Q. (By Mr. Kenny): Can you tell us whether or not, to the best of your recollection, you had ever signed any contract with Plomb Tool Company before that?

A. I don't remember any prior to this.

Q. I call to your attention that this copy which we have is signed by Mr. Moore. A. Yes, sir.

Q. Now, do you recall that Mr. Moore left the company about September 1st, 1938?

A. Yes, sir.

Q. In relation to that date would you say approximately when this contract was presented to you? A. It was just prior to his leaving.

(Testimony of Lionel H. Sanger.)

Mr. Kenny: We ask that this document between Plomb Tool Company and L. H. Sanger, "called the Salesman" be introduced as Plaintiff's next in order, No. 7.

Mr. Wall: I object to that on the grounds there is no showing that the document was ever executed by anybody except Mr. Moore for the Plomb Tool Company.

The Court: Any question about his authority?

Mr. Wall: No. But I do not believe the agreement ever [14] became an agreement, because I do not believe Mr. Sanger signed it, or at least I have not heard him so testify. Perhaps I missed it.

The Witness: I did not sign my copy. This is my copy. The copy that I signed was forwarded to the Plomb Tool Company.

Mr. Wall: You did sign one copy of this agreement?

The Witness: Yes, sir.

Mr. Wall: I withdraw my objection, your Honor.

The Court: Very well.

Mr. Wall: But I do object on the grounds of irrelevancy and immateriality because of the date being prior to the date of the contract under which Mr. Sanger was operating at the time he went into the service.

The Court: Very well, that objection is overruled. The document will be received as Plaintiff's Exhibit 7. That is item 8 of the Schedule?

(Testimony of Lionel H. Sanger.)

Mr. Kenny: That was item 8, yes. Directing your attention, gentlemen, to item 7.

Q. I show you, Mr. Sanger, a Memorandum of Agreement bearing date January 1, 1939, between the Plomb Tool Company and L. H. Sanger, "hereinafter called the Representative" and I will ask you if that is your signature and if that is Mr. Dillon Stevens' signature on that for the Plomb Tool Company? A. Yes, sir, it is. [15]

Mr. Kenny: We ask that this item 7 be received as Exhibit 8.

Mr. Wall: I object to that, your Honor, as irrelevant and immaterial, not being the contract which was in effect at the time the plaintiff went into the service.

The Court: Overruled.

Q. (By Mr. Kenny): Now, Mr. Sanger, can you testify whether that was signed as of the date it bore, to wit, January 1st, 1939, or whether it was signed, actually signed at some later date?

A. It was signed at a later date, to my memory, about three months, and then it was just mailed back.

Mr. Kenny: Directing your attention, gentlemen, to item 56.

Q. Mr. Sanger, I show you a mimeographed one-page memorandum to All Salesmen headed "Secret and Confidential," and ask you if you received that from the Plomb Tool Company on or about the date it bears, to wit, February 7, 1939?

(Testimony of Lionel H. Sanger.)

A. Yes, sir. That was sent to me for winning the sales campaign.

Mr. Kenny: We ask that that be received as Exhibit No. 9.

The Court: That is item?

Mr. Kenny: Item 56.

Mr. Wall: That is objected to, your Honor, as incompetent, [16] irrelevant and immaterial because dated prior to the contract in effect when Mr. Sanger went into the service; also, as being irrelevant to any issue in the case insofar as I can see according to its text.

Mr. Kenny: I merely say that the text refers to Mr. Sanger's having won a fine Hamilton watch on the basis of selling more things than anybody else.

The Court: It is offered to show his status, is that it?

Mr. Kenny: That is right.

Mr. Wall: And I submit that it has no bearing on status as it uses the equivocal term "salesmen."

The Court: Overruled, and received as Plaintiff's Exhibit 9.

Mr. Kenny: Without belaboring, Judge Harrison had a similar case of Lee against Remington-Rand, and they went in there at great length to prize contests and comparative sales statistics, and that is where I got my idea and that is what I am following now.

Next, item No. 57; that is more about this watch.

(Testimony of Lionel H. Sanger.)

Q. Mr. Sanger, I ask you if you received a one-page memorandum dated March 7, 1939?

A. Yes, sir, I did.

Mr. Kenny: We ask that that be received as Exhibit No. 10.

Mr. Wall: Same objection, your Honor. [17]

The Court: Overruled.

Mr. Kenny: Just to complete the sequence, Mr. Wall, we think it might be useful to put in No. 9, which I believe you have the original of. It is a supplement agreement. No. I withdraw that. I do not think No. 9 is material to our case. That is another transaction. We will withdraw that.

We now call your attention to item 46.

The Court: By "No. 9" you are referring to item 9?

Mr. Kenny: Yes, item 9. We will withdraw that.

Q. And I will ask you, Mr. Sanger, if on or about August 23 you received from Plomb Tool Company the following telegram: "Your Company Greatly Honored by Ellfeldt and Proud of You"?

A. Yes, sir.

Mr. Kenny: We ask that be received as Exhibit No. 11.

Mr. Wall: That is objected to, your Honor, as being clearly irrelevant so far as I can see to any issue in the case, unless it is connected up to show what this "Ellfeldt" proposition is.

Q. (By Mr. Kenny): Can you tell us what is the Ellfeldt Company?

A. Well, the Ellfeldt Company is a very large

(Testimony of Lionel H. Sanger.)

industrial supply company, and Plomb up to that time had been very unsuccessful with industrial tools; in fact we had been practically automotive up until that time. That was the first large one that was closed east of the West Coast. [18]

Mr. Wall: I renew the objection, your Honor. I do not see that the fact that apparently Mr. Sanger has done a good job at the Ellfeldt Company is material here. The issue here is as to his capacity as a salesman.

Mr. Kenny: You did not catch the nuances of it, nor will the record reflect it. I read the language "Your Company." The language "your company" is the language we depend upon.

The Court: This again, is to show status, is it?

Mr. Kenny: That is correct. It is "your company."

The Court: Overruled. That is, item 46 of the Schedule will be received as Plaintiff's Exhibit 11.

Q. (By Mr. Kenny): Now, Mr. Sanger, in December of 1939 did you attend a sales meeting of Plomb Tool Company here in Los Angeles?

A. Yes, sir.

Q. Can you tell who paid your expenses to come to that meeting?

A. The Plomb Tool Company paid my expenses.

Mr. Kenny: I will go on to item 58.

Q. On February 20, 1940, did you receive a one-page memorandum from Plomb Tool Company under the subject "Understanding Instructions"?

A. Yes, sir.

(Testimony of Lionel H. Sanger.)

Mr. Kenny: We offer that as Plaintiff's No. 12.

Mr. Wall: Which item, Mr. Kenny? [19]

Mr. Kenny: That is item 58.

Mr. Wall: 58?

Mr. Kenny: Yes.

The Court: Is there objection?

Mr. Wall: Pardon me, your Honor. I did not have the document. Yes, your Honor, that is objected to as incompetent, irrelevant and immaterial, as having no bearing whatsoever upon the status of this man, and as being dated prior to the period of the contract under which he went into the service.

Mr. Kenny: We agree that most of it is immaterial, but the final, ultimate paragraph is the one we depend upon, in which Plomb Tool Company says:

"You are a very 'top string' salesman. You know that, and I know it. Before you take the next step in industry, whether it be with this company or some other one, you will have to be a good organization man—and I leave you that to think about."

The Court: Objection overruled, received as Exhibit 12.

Q. (By Mr. Kenny): On April 8, 1940, did you receive from the Plomb Tool Company a memorandum—this is item 59, Mr. Wall—a memorandum entitled "Service Button"? A. Yes, sir.

Q. And with that memorandum did you receive a program entitled "Plomb Tool Company Family Day Party April Fifth"? A. Yes, sir. [20]

(Testimony of Lionel H. Sanger.)

Q. And does your name appear on the last page of that program under the "7 years" under the title "Presentation of Service Pins to Plomb Tool Co. Employees"? Does your name appear as a seven-year employee? A. Yes, sir.

Q. And did you receive a silver service button at that time? A. I did.

Mr. Kenny: We ask that the memorandum and the program of the Family Day Party be received as Plaintiff's Exhibit 13.

The Court: Is there objection?

Mr. Wall: No objection.

The Court: Received into evidence.

Mr. Kenny: This is item 60.

Q. On April 10, 1940, did you receive a two-page memorandum from the Plomb Tool Company headed "3 Months Review," ended at page 1 with a piece of verse, and on page 2 a "List of New Plomb Jobbers" in which your name appears?

A. Yes, sir, I did.

Mr. Kenny: We ask that be received as Plaintiff's 14.

Mr. Wall: That is objected to as irrelevant and immaterial because of the date in 1940, and also because we contend, at least, that the term "salesmen" does not necessarily bear that connotation.

The Court: Overruled. Received as Plaintiff's Exhibit 14. [21]

Mr. Kenny: Yes, I believe I will put it in. This one that you suggested, it is items 1 and 2 of the stipulation.

(Testimony of Lionel H. Sanger.)

Mr. Wall: Yes.

Q. (By Mr. Kenny): I will ask you if on or about January 18, 1941, you signed a contract with the Plomb Tool Company, a photostatic copy of which I show you herewith?

A. Yes, sir, I did.

Q. And if on March 19 you signed a sort of codicil to that called "Supplemental Territorial Agreement" amending paragraph c of that contract?

A. Yes, sir, I did.

Mr. Wall: The one you just referred to is item 2 in the stipulation, counsel.

Mr. Kenny: Yes. We will ask that those two items be introduced as a single item. It so turns out I have our file copy. Do you want the original?

Mr. Wall: We have the original if you prefer to introduce it.

Mr. Kenny: We might as well.

Mr. Wall: May I suggest, Mr. Kenny, that items 3, 4, 5, and 6 be introduced along with that, because those are further modifications of the same agreement prior to December 19, 1942.

Mr. Kenny: Yes, I will reach them. I am trying to bring everything in chronologically so far for the assistance of the [22] court.

The Court: Do you wish items 1 and 2, the contract of January 18, 1941, and the supplemental agreement of February 1, 1941, to comprise a single exhibit?

Mr. Kenny: I think that would be all right.

The Court: Exhibit 15.

(Testimony of Lionel H. Sanger.)

Mr. Kenny: Yes.

The Court: Received into evidence.

The Clerk: They will be attached.

Q. (By Mr. Kenny): Referring to items 3 and 4 of the Pre-Trial Stipulation, on or about December 16, 1941, did you sign a document which I show you a photostatic copy of, purporting to be an extension of the agreement just introduced into evidence; and did you also on April 22nd sign a supplement to that agreement amending paragraph c?

A. I did.

Mr. Wall: I have the originals, Mr. Kenny. Would you like to use them?

Mr. Kenny: Yes. We ask, then, that the originals be introduced as a single exhibit, No. 16.

The Court: Is there objection?

Mr. Wall: No objection, no.

The Court: Very well, received as one exhibit, Exhibit 16.

Mr. Kenny: Item 29, gentlemen. [23]

Q. Did you receive a letter on September 9, 1942, from Dave Gesick, president of the Plomb Employees Association?

A. I received that. There was a deduction made from my commissions on this letter.

The Court: Please talk louder.

The Witness: Yes, sir.

The Court: Suppose you were talking to people back in the back of the room.

A. There was a deduction made from my commissions and this letter was written to thank me

(Testimony of Lionel H. Sanger.)

for the amount donated to the employees club, to the club house.

Mr. Kenny: We ask that that be received as Plaintiff's No. 17.

Mr. Wall: That is objected to, your Honor, as incompetent, irrelevant and immaterial; and also hearsay, not binding upon the defendant in that Mr. Gesick who signs the letter does not even purport to sign as a representative of the defendant. He appears to be, according to the letter, the president of Plomb Employees Association and not the Plomb Tool Company.

Mr. Kenny: I think perhaps the problem is best resolved by your Honor examining the document, because it has a picture on it of something that has to do with the Plomb Tool Company. At the bottom it says that Mr. Sanger's name is going to be on a plaque out there on Vernon Avenue.

The Court: Do you expect to connect this [24] up?

Mr. Kenny: Yes. I think item 47 will connect it up. I will not offer it at this precise moment.

The Court: Very well, upon counsel's assurance that he will connect it up, the objection is overruled and item 29, the letter of September 9, 1942, is received as Plaintiff's Exhibit 17, Mr. Clerk?

The Clerk: Right, your Honor.

Q. (By Mr. Kenny): On August 13, 1942, did you receive a memorandum from the Plomb Tool Company reading as follows:

(Testimony of Lionel H. Sanger.)

“Under separate cover I have sent you your 10-year pin. Congratulations!”

Mr. Wall: Is this item 47?

Mr. Kenny: This is item 47, yes.

Q. “You deserve a good room in the new club house so I am placing your name on the waiting list for the one overlooking the garden.”

I am offering that to connect up the other, and I am offering this for status. We offer that as Plaintiff’s 18.

Mr. Wall: May I ask a slight delay until I find this item?

Mr. Kenny: All right.

Mr. Wall: Well, that is objected to, your Honor, as incompetent, irrelevant and immaterial. I do not see that it serves the connecting-up purpose which Mr. Kenny indicates, nor do I see that the reference to a room in the club house [25] has any bearing upon any of the issues. Perhaps the reference to the 10-year pin may make it admissible for that purpose.

Mr. Kenny: The 10-year pin is to show status. The reference to the club house is to connect up with the letter from Mr. Dave Gesick about the employees’ club house that was the subject of an objection last made.

The Court: Very well, the objection is overruled and item 47 is received as Plaintiff’s Exhibit 18.

Mr. Wall: May I also, your Honor, move to strike, then, Exhibit 17, being the Gesick letter prior to this, on the ground that the Exhibit 18 just ad-

(Testimony of Lionel H. Sanger.)

mitted does not serve to connect it up and show the materiality?

The Court: The motion will be denied without prejudice to the renewal of it. There may be other evidence to connect it.

Q. (By Mr. Kenny): Do you know Dave Gesick?
A. No, sir, I do not.

Q. Item No. 6. Did you receive a letter from Plomb Tool Company on September 23, 1942, attaching a "Notification" item, which is item 5 here, relating to the handling of Government contracts in the war effort?
A. Yes, sir, I did.

Mr. Kenny: We ask that the letter of September 23 and the attached "Notification" be received as one exhibit.

The Court: That would be items 5 and 6? [26]

Mr. Kenny: Yes.

Mr. Wall: I have the original notification, Mr. Kenny.

Mr. Kenny: I have a duplicate original.

The Court: Is there objection to the offer?

Mr. Wall: No objection, your Honor.

The Court: Received into evidence as Plaintiff's Exhibit 19.

Q. (By Mr. Kenny): Item No. 30. You received a letter from Mr. Kerwin of the Plomb Tool Company on September 24, 1942, did you, Mr. Sanger?
A. Yes, sir.

Mr. Wall: Which item, Mr. Kenny?

Mr. Kenny: No. 30. I offer that as Plaintiff's No. 20.

(Testimony of Lionel H. Sanger.)

The Court: Is there objection?

Mr. Wall: Yes. That is objected to as incompetent, irrelevant and immaterial, and as having no bearing upon the status which I can see.

The Court: Overruled.

Mr. Kenny: Item No. 18. I think you have the original of this one, Mr. Wall.

Mr. Wall: 18?

Mr. Kenny: Yes.

The Clerk: The last one was admitted, your Honor, 20?

The Court: Yes. Objection overruled. Item 30 is received as Plaintiff's Exhibit 20. [27]

Q. (By Mr. Kenny): On October 17, 1942, did you receive an inter-office memo from Mr. Kerwin of the Plomb Tool Company, "Subject Draft"?

A. I did.

Q. And following the notation "I'm 5-A (bachelor with children?)" did you add this notation in typewriting that appears: "First allow me to say that I didn't" and so on, ending "Best regards, Lionel"? A. Yes, sir.

Mr. Wall: Here is the original, Mr. Kenny.

Q. (By Mr. Kenny): You did?

A. Yes, sir.

Mr. Kenny: I ask that that be received as No. 21.

Mr. Wall: No objection.

The Court: Received into evidence.

Q. (By Mr. Kenny): On October 27, 1942—this is item 27—did Mr. Morris Pendleton give you a letter signed by him, addressed to the "Office of

(Testimony of Lionel H. Sanger.)

Naval Officer Procurement, re: Lionel H. Sanger”?

A. Yes, sir, he did.

Q. Is this Mr. Pendleton’s signature?

A. Yes, sir.

Mr. Kenny: We ask that that be received as Plaintiff’s No. 22.

Mr. Wall: No objection. [28]

The Court: Received into evidence.

Q. (By Mr. Kenny): Did you write a letter on November 19, 1942, to a person named “Chris” at the office of the Plomb Tool Company in Los Angeles?

A. I did.

Q. Will you state——

Mr. Wall: May I ask the item number?

Mr. Kenny: That is item 19. I am sorry.

Q. Will you state who Chris is?

A. Chris was Miss Christensen that was acting as either salesmanager or assistant salesmanager at that time—I believe salesmanager.

Mr. Kenny: I believe you have the original of that, Mr. Wall.

Mr. Wall: I have.

Mr. Kenny: We ask that be offered into evidence as Plaintiff’s 23.

Mr. Wall: No objection, your Honor.

The Court: Received into evidence.

Mr. Kenny: And I ask, Mr. Wall, if this memorandum in handwriting at the bottom of the letter is written, as far as you know, by Miss Christensen?

Mr. Wall: I have no information on it. I as-

(Testimony of Lionel H. Sanger.)

sume that probably is true from the initials, but I suggest that we stipulate that the hand-written portion be ignored. I do [29] not think it has any material bearing here.

Mr. Kenny: I would rather have it in.

Mr. Wall: May I consult with my client and then see if that is the lady's initials?

The Court: You are referring now to Exhibit 23?

Mr. Kenny: That is correct, your Honor.

Mr. Wall: Mr. Kenny, all I can state is that on comparing the initials with the signature of the young lady in question, they do not seem to compare; so I do not know whose they are. I will be glad to show you the comparison if you would like to see it.

Mr. Kenny: That is all right. Let us let it go in and stipulate that the pencilled notation may be disregarded.

The Court: Still referring to Exhibit 23, gentlemen?

Mr. Kenny: That is correct, your Honor. Item 28.

The Clerk: Shall I strike the pencilled notation to keep the record clear?

The Court: No. The stipulation will show in the record.

The Clerk: Marked 23.

Mr. Kenny: Item 28.

Q. Did you receive on December 11th, Mr. San-

(Testimony of Lionel H. Sanger.)

ger, a letter from Dillon Stevens on the stationery of the Plomb Tool Company?

A. Yes, sir, I did.

Q. Which reads: [30]

“To Whom It May Concern:

“Mr. Lionel H. Sanger has been employed by the Plomb Tool Company for over 10 years”?

A. Yes, sir, I did.

Mr. Kenny: We ask that be received as Plaintiff's Exhibit No. 24.

The Court: Received into evidence.

Q. (By Mr. Kenny): Did you receive a letter from Miss Christensen—this is item No. 48; it is also item No. 21; apparently we duplicated on that one—a letter from Miss Christensen of the Plomb Tool Company, dated December 24, 1942?

A. Yes, sir, I did.

Mr. Kenny: We ask that be received as Plaintiff's No. 25.

Mr. Wall: No objection.

The Court: Received into evidence.

Mr. Kenny: This is item No. 50.

Q. I show you a house organ of the Plomb Tool Company called “The Anvil Chorus,” Friday, January 1, 1943, and calling your attention to page 3, ask if the letter which is printed on that, headed “A Letter to Mr. Stevens ‘For the Plomb Gang’” and signed by “Lt. L. H. Sanger,” was written by you?

A. Yes, sir; it was written by me. That is a copy of it. [31]

(Testimony of Lionel H. Sanger.)

Mr. Kenny: We ask that page 3 of *The Anvil Chorus* be introduced as Nov. 26.

Mr. Wall: That is objected to, your Honor, as incompetent, irrelevant and immaterial, being dated January 1, 1943, which was after the plaintiff had gone into the armed forces, and has no bearing, no possible bearing on the issue of status or any other issue in the case.

The Court: Overruled. That is item 50?

Mr. Kenny: That is item 50, correct.

The Court: It will be received as Plaintiff's Exhibit 26.

Mr. Kenny: Item 49.

Q. Did you receive, Mr. Sanger, a letter from Dillon Stevens dated December 31, 1942, addressed to you at Quonset Point, Rhode Island?

A. Yes, sir, I did.

Mr. Kenny: We ask that that be received as Plaintiff's No. 27.

Mr. Wall: The same objection, your Honor, it being dated after the plaintiff's entry into the Navy, and as having in its text no bearing at all on the issue of status.

The Court: Objection overruled. It will be received as Plaintiff's Exhibit 27. I assume it is offered to show status?

Mr. Kenny: That is correct, and the [32] attitude. It is offered to do what Judge Minton referred to in his decision when he was still on the Seventh Circuit, to show the attitude of the company when they were waving the flag as against

(Testimony of Lionel H. Sanger.)

when they were up against their liabilities under the Selective Service Act. I will give the citation, your Honor. I think it is already in the pre-trial memoranda.

Item No. 61.

Q. On July 20, 1945, did you receive a letter from Mr. R. W. Kerr, vice-president and treasurer of the Plomb Tool Company, upon the stationery of the Plomb Tool Company?

A. Yes, sir, I did.

Mr. Kenny: We ask that that letter be received as Plaintiff's No. 28.

The Court: Is there objection?

Mr. Wall: No objection.

The Court: Received into evidence.

Q. (By Mr. Kenny): Now, that exhibit 28 contains a statement by you—no, a statement by Mr. Kerr, the first paragraph:

“Bill Wetz was in to see me the other day and that reminded me I owed you a reply to your note of May 15.”

Who is Bill Wetz?

A. Bill Wetz was one of my assistants that worked with me. [33]

Q. When did he start to work for you?

A. Offhand, I believe he worked for me about two years.

Q. And under what circumstances did you happen to hire him?

A. The Plomb Tool Company insisted that I have assistance in the territory and they wrote me

(Testimony of Lionel H. Sanger.)

to that effect and they loaned me a vehicle for the use of the man I was to hire.

Q. What kind of a vehicle was that?

A. It was a display vehicle. It was a half-ton or a three-quarter ton Dodge truck with special glass panel sides, displaying the Plomb tools only.

Q. And you hired Mr. Wetz at that time?

A. Yes, sir. I think Mr. Wetz—right after I got the truck was when I hired Mr. Wetz.

Q. Mr. Wetz went in the Navy, too?

A. Yes, sir.

Q. And he was in the Navy on July 20, 1945, when this was written, to the best of your knowledge?

A. Yes, sir.

Q. This exhibit also contains a statement by Mr. Kerr that he “owed you a reply to your note of May 15”?

A. Yes, sir.

Q. Have you a carbon copy of your note of May 15th?

A. No, I do not have, but I wrote Mr. Kerr. [34]

Q. What was the note of May 15th about?

A. I told him that I expected to be out of the service very shortly; I was very anxious to start in where I had finished, and just more or less along those lines; that I was anxious to get back with the Plomb Tool Company.

Q. What date did you get out of the service?

The Court: It is covered by the stipulation.

Mr. Kenny: Yes, I think it is.

Mr. Wall: Yes.

The Court: November of 1945, was it not?

The Witness: Yes, sir.

(Testimony of Lionel H. Sanger.)

Q. (By Mr. Kenny): And when did you come to Los Angeles? A. December, 1945.

The Court: We will take the noon recess at this time. Is there any objection to resuming at 1:30, gentlemen?

Mr. Kenny: None whatsoever.

Mr. Wall: It will be satisfactory, your Honor.

The Court: Very well, recess until 1:30 this afternoon.

(Whereupon, a recess was taken until 1:30 o'clock p.m. of the same day, 'Tuesday, December 19, 1950.) [35]

Tuesday, December 19, 1950—1:30 P.M.

LIONEL H. SANGER

Direct Examination

(Resumed)

By Mr. Kenny:

Q. Mr. Sanger, at adjournment time we had brought you up to the point where you had come to Los Angeles after being mustered out of the service. Who did you first see at Plomb Tool Company upon that first visit in December, 1945?

A. When I first arrived I saw Mr. R. W. Kerr.

Q. In what position was Mr. Kerr? Was he still vice-president and salesmanager of the company? A. Yes, sir; I think he was.

Q. Was there anybody present at this first conversation you had with Mr. Kerr besides yourself and Mr. Kerr?

A. Mr. Pendleton came in shortly after we started.

(Testimony of Lionel H. Sanger.)

Q. Will you tell us what you said and what Mr. Kerr said when you two were together, and then when Mr. Pendleton came into the room? What was said by all three of you at that time?

Mr. Wall: If your Honor please, I object to the question as an attempt to duplicate or to vary from the stipulation of facts. The stipulation sets forth that the plaintiff sought reinstatement in the position that he had had prior to the war, and sets forth the offers made by the defendant. I see no need of going into those matters at this time if [36] it is intended merely to repeat what is in the stipulation. If it is an attempt to vary it, I think that would be improper and immaterial.

The Court: It may be an attempt to add to it, may it not? Is that the purpose of it?

Mr. Wall: That is possible.

Mr. Kenny: The stipulation, I believe, is in the usual form, that evidence not in conflict therewith may be offered.

The Court: Is it the purpose to add to?

Mr. Kenny: To amplify and add to, yes.

The Court: Very well. I assume there is no objection?

Mr. Wall: No; that is correct, your Honor.

The Court: You may proceed.

A. I talked to Mr. Kerr prior to Mr. Pendleton's arrival, and he told me that he certainly looked forward to having me with the Plomb Tool Company. But he told me that there was a research organization from the east working directly with

(Testimony of Lionel H. Sanger.)

Mr. Pendleton and that, of course, Mr. Pendleton would have the final say.

Q. (By Mr. Kenny): Now, what kind of a research organization did he say that was?

A. To assist in sales, and he mentioned they had recommended that all Plomb representatives carry only one line.

Q. All right; go ahead with your conversation with Mr. Kerr. [37]

A. When Mr. Pendleton then came in, he told me that he was sure glad to see me back and that I had done such an outstanding job—this was told after we had talked on the same subject about my representing the other firms having the other lines—and he said, “Well, we are certainly going to have to make some exception for you, Lionel.” So then we went—Mr. Kerr and I were the only ones in the conversation then.

Q. You mean that Mr. Pendleton left the room?

A. Yes. I believe he went to attend a meeting.

Q. All right. Then what was said between you and Mr. Kerr?

A. Then we talked about what had transpired while I was gone, how Mr. Friend or Freund, I believe it is pronounced, was working in that territory and that—

Q. Working in your former territory?

A. In my former territory.

Q. Yes.

A. And he said, “Would you like to carry your other lines and the Plomb line and work under Mr.

(Testimony of Lionel H. Sanger.)

Freund, whom we are thinking of sending to Chicago and combining the Chicago territory?" which I think consisted of Wisconsin, Indiana and Illinois. I am not too sure of the exact boundaries, "or would you like to come with us to work out of Chicago?" because they had practically no business in that area, and [38] "have Mr. Freund work for you and the men he now has working for him?" And I told him it meant not too much difference. He said he didn't think it advisable except that I drop the other lines and go with Plomb exclusively. But I told him I would drop the other lines if he would just give me some time to give these firms some notice, because these firms had paid me while I was in the service and Plomb had not. And he said, "Well, just drop them a note and tell them you have got something better, and that is all there is to it." And I said I just couldn't do a thing like that. I was bound loyally to them. They were square with me for four years away, pretty near four years, and I didn't feel that that was right. He said, "Well, let me talk to Morris Pendleton." So next day I saw him again and he said, "Well,"—

Q. Who was present the next day?

A. Just Mr. Kerr.

Q. And yourself? A. Yes, sir.

Q. All right. What was said on that occasion?

A. The next day he said, "Lionel, we are going to send for Ed Freund. We will have him out here. You just stand by." I believe it was about two or three days later that Mr. Freund arrived from Kan-

(Testimony of Lionel H. Sanger.)

City. He said, "Now, there is no use"—I came in again, and he said, "Now, you are going to have to give us time, a couple of days, with Freund to get [39] this thing straightened out."

Q. That was Mr. Kerr, is that right?

A. That was Mr. Kerr.

Q. What did he say?

A. So he said, "You call in every day and either contact me or my secretary, and we will have something final within a couple of days." I kept calling. Then after about the seventh or eighth day I couldn't contact either Mr. Pendleton or Mr. Kerr, and I think I was informed Mr. Pendleton had gone east. And I finally reached Mr. Kerr somewhere around the 18th of January, which was about three weeks after I was told originally to call every day, which I had done. He says, "Lionel, the best thing for you to do is to return to Kansas City, keep in touch with us and we will be in touch with you." So I wrote him several notes, never heard from them.

Mr. Wall: If your Honor please, I move to strike all of the testimony that this witness has just given relating to the purported offers made to him and his reply to those offers. I wish to call your Honor's attention to paragraphs 10 and 11 of the Stipulation of Facts on file here which states specifically the offers that were made to the plaintiff. He was offered a position as an employee, "selling exclusively the products of the defendant and its

(Testimony of Lionel H. Sanger.)

subsidiary corporations * * * either in the territory in which plaintiff had been [40] previously authorized to sell" before the war or in the "Chicago territory." He was told that if——

The Court: I have read it, Mr. Wall. You are just taking time.

Mr. Wall: I am sorry, your Honor. It seems to me that what the witness has just said is contrary in several respects to the terms of the stipulation.

The Court: It was not offered for that purpose and it will not be considered for that purpose, unless some development, but I do not care to measure the words of the witness against the stipulation and try to determine whether one amplifies or disputes the other. Motion denied.

Mr. Kenny: Items 25, gentlemen, and 26.

Q. On January 27th, from the Hotel Phillips, Kansas City, did you write a letter to Mr. Robert Kerr of the Plomb Tool Company?

A. Yes, sir, I did.

Q. Is this a photostatic copy of it?

A. Yes, sir.

Mr. Wall: I have the original. Would you like to see it?

Mr. Kenny: Fine. I will offer item 25 as Plaintiff's 29.

The Court: Is there objection?

Mr. Wall: No objection.

The Court: Received into evidence. [41]

Q. (By Mr. Kenny): And thereafter on the 31st of January did you receive a letter from Mr.

(Testimony of Lionel H. Sanger.)

Kerr of the Plomb Tool Company, item 26, addressed to you in Kansas City?

A. Yes, sir, I did.

Q. Is this a photostatic copy of that?

A. Yes, sir.

Mr. Kenny: Have you the original, Mr. Wall?

Mr. Wall: That is item 26?

Mr. Kenny: Yes.

Mr. Wall: No. All I have is the carbon copy retained in the Plomb files, addressed to the plaintiff. I assume he would have the original.

Mr. Kenny: We ask that the carbon copy furnished by counsel for the defendant be marked as Plaintiffs' Exhibit No. 30.

Mr. Wall: No objection.

The Court: Received into evidence.

Mr. Kenny: Item 62, gentlemen.

Q. And thereafter, on February 10, 1946, did you write a letter to Mr. Kerr on the stationery of the Hotel Continental, Kansas City, a carbon copy of which I now exhibit to you? A. I did.

Q. And I ask you if this is the carbon copy that I now exhibit to you? [42] A. It is, yes, sir.

Mr. Kenny: I ask that that be received into evidence as Plaintiff's 31.

Mr. Wall: That is objected to, your Honor, as incompetent, irrelevant, and immaterial, containing, as far as I can tell, principally self-serving declarations on the part of the plaintiff.

The Court: It is a part of a chain of correspondence, is it not?

(Testimony of Lionel H. Sanger.)

Mr. Wall: Well, it does not indicate—I will take it back, your Honor. It does indicate that it is a reply to a letter of December 31st.

The Court: Objection overruled. It will be received as Plaintiff's Exhibit 31.

Q. (By Mr. Kenny): Did you receive any reply to that letter which has just been received as Exhibit 31, that letter to Mr. Kerr?

A. I received a telegram later, I think. I am not sure right now if it was in reply to that, but it was a telegram saying that he was coming east sometime in March.

Q. Did you ever have any conversation with Mr. Kerr after that?

A. When he came east in March, around the first part of March, we had lunch together.

Q. Was there anyone else present at that [43] luncheon? A. No, sir.

Q. What did Mr. Kerr say and what did you say at that time?

A. Well, I thought he came prepared with some offer, as none had been made up to that time. And he told me that Mr. Pendleton was still of the same opinion that he was going to listen to this eastern research firm, and there was nothing he could do, but he would definitely let me hear from him and I would hear from either he or Morris Pendleton when he got back to California. I waited for that and never heard.

Mr. Wall: If your Honor please, without wishing to labor the point, I move to strike the testi-

(Testimony of Lionel H. Sanger.)

mony that says to the effect that no offer had been made up to that time, referring to March, 1946, because it is stipulated that the offers were made in January.

Mr. Kenny: I think it may go out as far as we are concerned. It is a conclusion. I was merely asking for the conversation.

The Court: Very well, that portion of the answer will be stricken.

Q. (By Mr. Kenny): Did you ever have any correspondence with Mr. Kerr or Mr. Pendleton or any official of the Plomb Tool Company after that?

A. Not after that, no, sir.

Mr. Wall: Was that March of 1946? [44]

A. Not after that March.

Q. (By Mr. Kenny): Did you ever have any conversation with Mr. Morris Pendleton after that?

A. No, sir.

Q. I show you a printed card that says "Plomb, Lionel H. Sanger, Representing The Plomb Tool Co.," and ask you the circumstances of how that came to be printed?

A. Those were the cards that were furnished by the Plomb Tool Co. to representatives and salesmen.

Q. About when would you say this particular card was furnished to you?

A. That card was furnished in either '41 or '42. I don't remember. As we ran out we would order more. Those were a standard card.

Q. And that was printed and paid for and given to you by the Plomb Tool Co.?

A. Yes, sir.

(Testimony of Lionel H. Sanger.)

Mr. Kenny: We ask that this card be received as Exhibit 32.

The Court: What is that item number?

Mr. Kenny: That is not itemized, your Honor. That is an added card.

The Court: Is there objection to it?

Mr. Wall: No.

The Court: Received into evidence. [45]

Mr. Kenny: I wonder if I may have Exhibit 1 for identification?

The Court: This chart, Mr. Clerk.

Q. (By Mr. Kenny): On Exhibit 1 for identification, Mr. Sanger, there are markings in ink for the years '43, '44, and 1945, showing receipts from Wohler, Powell Muffler, Eis Manufacturing Co., Precision Parts Co., and Pep Manufacturing Co., and I ask you if you put those figures on this diagram? A. I did.

Q. Will you state where you got those figures?

A. I took those figures from my books showing the income that I received, and that is the amount of money that was paid to me by the firms that you mentioned while I was in the service.

Mr. Kenny: You may cross-examine.

Q. (By Mr. Wall): Mr. Sanger, in your direct examination you testified——

The Court: Will you conduct the examination from the lectern, Mr. Wall?

Mr. Wall: Oh, I beg your pardon.

Mr. Kenny: If I might interrupt just a moment? Mr. Morris has called to my attention in the motion

(Testimony of Lionel H. Sanger.)

for summary judgment that long correspondence that went to whether or not the Statute of Limitations was tolled or not, and to save extending the record here, we would offer at this time the [46] affidavit and the exhibits of Mr. Sanger which were introduced at that time.

Mr. Wall: The affidavit and the exhibits?

Mr. Kenny: Yes. Yes, that is the affidavit which was filed April 10, 1950—not to the merits of the case, but merely out of an excess of caution on the issue of the Statute of Limitations.

The Court: The exhibits A to O attached to the affidavit?

Mr. Kenny: That is right.

Mr. Wall: If your Honor please, I have no objection to the reception of those exhibits for the limited purpose of showing the acts and correspondence involved during the period of delay. I would object to them if they were offered for any other purpose, and I do object to the offer of the affidavit of the plaintiff as such. It seems to me that that has now been superseded by our stipulations and by his testimony.

Mr. Kenny: I think that is probably right—just the exhibits that are attached to it.

Mr. Wall: Which, incidentally, are items 31 to 45, inclusive, in the stipulation.

Mr. Kenny: That is correct.

The Court: Do you have extra copies, or do you wish the copies attached to the Sanger affidavit filed April 10, 1950, to be marked in evidence, pursuant

(Testimony of Lionel H. Sanger.)

to your stipulation, as exhibits next in order? [47]

Mr. Kenny: I think that would be the best.

Mr. Wall: I think that would be satisfactory.

The Court: As I understand, it is stipulated that that correspondence did pass on or about the dates borne by the letters?

Mr. Wall: That is correct.

Mr. Kenny: And it is only offered on the issue of the Statute of Limitations or laches, because some of it is clearly inadmissible on the merits, and some of it even talks about a proposed settlement of the lawsuit.

Mr. Wall: That is correct. And there are legal briefs on both sides, too. I think none of it is offered for proof of the truth of the facts at all, but simply of the fact that those letters and pieces of correspondence did pass.

The Court: What items, now?

Mr. Morris: 31 to 45, your Honor.

The Court: Very well. Item 31 is received into evidence as Exhibit 33; item 32 will be Exhibit 34; item 33 will be Exhibit 35; item 34 will be Exhibit 36; item 35 will be Exhibit 37; item 36 will be Exhibit 38; item 37 will be Exhibit 39; item 38 will be Exhibit 40; item 39 will be Exhibit 41; item 40 will be Exhibit 42; item 41 will be Exhibit 43; item 42 will be Exhibit 44; item 43 will be Exhibit 45; item 44 will be Exhibit 46; and item 45 will be Exhibit 47 in evidence.

Does that complete the direct examination? [48]

Mr. Kenny: That completes the direct.

(Testimony of Lionel H. Sanger.)

Cross-Examination

By Mr. Wall:

Q. Mr. Sanger, you testified on direct examination that certain deductions were made from your commissions for a contribution to the Plomb Employees' Association club house, is that correct?

A. Yes, sir; that is correct.

Q. Do you recall the amount of your contribution to that?

A. It was, to my memory, \$50.00 or \$100.00.

Q. That was a voluntary deduction, a voluntary contribution, was it not, on your part?

A. No, sir. A letter was written by Mr. Dillon Stevens advising me that he had deducted whatever the amount was from my commission check and that the deductions were made in proportion to the salesmen's earnings. But I don't have the copy of that letter.

Mr. Wall: This is item 10 under the stipulation, Mr. Kenny.

Q. Mr. Sanger, I show you a letter dated March 29th, 1940, on the letterhead of "Kansas City Warehouse Service Co.," addressed to "Plomb Tool Co., Attention Mr. Morris Pendleton," and signed "Lionel." Is that your signature?

A. Yes, sir. [49]

Mr. Wall: I will offer this letter into evidence as the defendant's first exhibit, I guess.

Mr. Kenny: I will make the objection that it is

(Testimony of Lionel H. Sanger.)

immaterial and has no bearing on any of the issues in this case.

Mr. Wall: This is offered, your Honor, for the purpose of showing the actions of the parties under the relationship that they had, showing——

The Court: It is on the issue of status?

Mr. Wall: That is correct, your Honor.

The Court: Overruled.

Mr. Kenny: That being the case, your Honor, I will not press the objection.

The Court: Very well.

The Clerk: Defendant's Exhibit A.

Mr. Wall: Item 11 is the next one, Mr. Kenny.

Q. I show you a carbon copy of a memorandum to "Sanger" from "M. B. P.," dated April 15, 1940, on the subject of "K. C. Warehouse," Mr. Sanger, and ask you if you recall receiving the original of that? I might state to you that it has been stipulated that you did so receive it.

A. Yes, I did.

Mr. Wall: I will offer this as Defendant's Exhibit B, also on the issue of status.

The Court: Received into evidence. I assume there is no objection to that? [50]

Mr. Kenny: No objection.

The Court: Very well.

Mr. Kenny: It is all part of the correspondence between the parties here.

Q. (By Mr. Wall): In your direct examination, Mr. Sanger, I believe you testified that you hired

(Testimony of Lionel H. Sanger.)

Mr. Bill Wetz, I think it was, as one of your assistants? A. Yes, sir.

Q. When the company requested it or suggested it. I call your attention to this letter, Defendant's Exhibit A, dated March 29th, 1940, which you wrote to Mr. Pendleton; and I take it from that letter that you were then engaged in discussing with Mr. Pendleton over the possibility of moving the warehouse, is that correct, moving the Kansas City warehouse?

A. Yes, sir.

Q. Is it correct that you were opposing the moving of the Plomb stock from the warehouse where it was then located to another warehouse; is that true? A. Yes, sir.

Q. Calling your attention to Exhibit B, I note that in that letter from Mr. Pendleton to you, in the last paragraph he says: "I am instructed to say to you that you put on a much needed missionary man and we will leave the warehouse as is, and I think we will both be better off." Is that the [51] suggestion which you referred to in your direct testimony as a result of which you hired Mr. Wetz?

A. Not on this specific statement. There is another letter whereby—of course, they had been insisting on another man, but I think it was in another letter, saying something about additional territory and that I should put on another man to help cover, and then this man was for the territory without the additional territory.

Q. Did you after receipt of this letter of April

(Testimony of Lionel H. Sanger.)

15, 1940, Exhibit B, hire an additional man to use in your territory? A. Yes, sir.

Q. But that was not Mr. Wetz?

A. I think that was Mr. Wetz at that time; yes, sir.

Q. In other words, you think you did hire Mr. Wetz shortly after receiving this letter?

A. Yes.

Q. Did you have another employee in the territory at that point?

A. The other employee was furnished to me by the Plomb Tool Co. His name was Mr. Nate Needham. He was paid by the company.

Q. What were his duties?

A. His duty was also missionary work.

Mr. Kenny: May I interrupt to ask the witness to explain, perhaps to the court and to me, what missionary work [52] means?

The Witness: Missionary work is work done with the account that I would sell. In other words, he would help the customer, the customer salesman in selling tools to the garage, to ultimate sales.

Mr. Kenny: In other words, the missionary man helped your customer to resell the tools you sold him?

The Witness: Correct.

Q. (By Mr. Wall): And it is a fact, is it not, that the missionary man receives no commission from Plomb Tool Co. on those resales?

A. The one man being paid a direct salary and

(Testimony of Lionel H. Sanger.)

expense by the Plomb Tool Co., and I paid my assistant, I believe, a flat salary at the time.

Q. And this assistant of yours, Mr. Wetz, he is the one, is he, to whom you paid a flat salary at that time? A. Yes, sir.

Q. What did Mr. Wetz do in connection with your selling activities?

A. Mr. Wetz would distribute catalogs and help repair display boards and show new tools.

Q. He did whatever you asked him to do, is that correct?

A. Well, in the company contract we had to keep repair on display boards and it was quite a job.

Q. But he did whatever activities you assigned to him, [53] is that correct?

A. That is correct.

Q. I show you a letter dated—and this is item 12, Mr. Kenny—a letter on the letterhead of Hotel West, dated April 13, 1940, addressed “Dear Morris,” and signed “Lionel.” Is that your signature, Mr. Sanger? A. Yes, sir.

Q. And I take it this is in reply to the letter regarding the warehouse move which I have just shown you as Exhibit B, is that correct?

A. I think it is.

Q. And I note that you state in the second paragraph of your letter——

Well, perhaps I had better offer this into evidence first. May I offer this letter of April 23, 1940, item 12, into evidence as Defendant’s next exhibit?

The Court: Is there objection?

(Testimony of Lionel H. Sanger.)

Mr. Kenny: No objection.

The Court: Received into evidence.

The Clerk: C.

Q. (By Mr. Wall): I note that in that letter you state in the second paragraph:

“Regardless I am going to live up to my part of the bargain and will place the missionary man on at the earliest possible date.” [54]

Is that the Mr. Wetz that you have referred to, or the other missionary man?

A. That was Mr. Wetz.

Mr. Wall: That was Mr. Wetz. Item 13 is next, Mr. Kenny.

Q. I show you a copy of a Western Union telegram dated August 23, 1940, addressed to “Lionel Sanger” and signed “Winslow.” Do you recall receiving the original of that telegram?

A. Yes, sir, I do.

Mr. Wall: I will offer this as defendant’s next exhibit in order.

Mr. Kenny: No objection.

The Court: Which item is that, 13?

Mr. Wall: That is item 13, your Honor.

The Court: Received into evidence.

The Clerk: Exhibit D.

Q. (By Mr. Wall): I believe you stated in your direct examination this morning, Mr. Sanger, that the company made available to you a display truck, is that correct? A. That is correct.

Q. I note that in this telegram, Exhibit D, there is apparently some reference made to that truck. It

(Testimony of Lionel H. Sanger.)

states: "You Purchase Two Tires Jack and Have Top Repaired and We will Reimburse. Hereafter You Stand All Expense Operation [55] and Repairs." Do you recall whether that did refer to the display truck that you mentioned this morning?

A. That is correct.

Q. After that time did you pay the expenses of the operation of that truck? A. I did.

Q. This telegram was sent to you about the time the truck was first made available to you, was it not?

A. I don't remember that. I couldn't say. I think they had—there was an overhaul job on that truck, and I don't recall if it was made prior to this. It seems like afterwards there was considerable trouble with the truck and I wrote and told them about the additional repairs, and I think they okayed that. I don't really remember.

Q. It is stipulated in the Pre-Trial Stipulation of Facts here that the company did reimburse you for a certain amount—I have forgotten the dollar figure—for truck repairs. I take it that is the reimbursement referred to in this telegram, is that correct? A. It may be, yes, sir.

Q. And thereafter you paid all expenses of the truck. I note also that this telegram, Exhibit D, states: "Compensation Insurance on Assistant Undoubtedly Necessary But Your Concern Since He Is Your Employee." Do you recall whether that referred to your assistant, Mr. Wetz, that you [56] have mentioned? A. It does.

(Testimony of Lionel H. Sanger.)

Q. Did you pay the compensation insurance with regard to Mr. Wetz?

A. I did not carry compensation insurance.

Q. You did not carry compensation?

A. On one employee in the State of Missouri I don't think it is necessary.

Mr. Wall: Item 14 I have now, Mr. Kenny.

Q. I show you, Mr. Sanger, a letter on the letter-head of the Kansas City Warehouse Service Company dated January 16, 1941, addressed to "Dear Willie," and signed "Lionel." Is that your signature? A. Yes, sir.

Q. I notice that this letter shows "Kansas City Warehouse Service Company" and then has "L. H. Sanger" printed toward the upper left-hand corner. Did you have your office in Kansas City at the Kansas City Warehouse Service Company?

A. Yes, sir.

Mr. Wall: I will offer this as the defendant's next exhibit.

The Witness: At that time.

Mr. Wall: Yes, at that time. That is January, 1941.

The Court: Is there objection?

Mr. Kenny: No objection. [57]

The Court: Received into evidence.

The Clerk: E.

Q. (By Mr. Wall): That was in January of 1941, then, that you had your office at the Kansas City Warehouse Service Company? A. Yes.

Q. Did you own any financial interest in that company, Mr. Sanger?

(Testimony of Lionel H. Sanger.)

A. I think that was—I think I owned it slightly prior to that, a half interest, but I only had it a very short time and sold it.

Q. During the time that you owned that half interest in the Kansas City Warehouse Service Company did you maintain your office there?

A. I have never maintained an office except where the Plomb Tool stock was carried. In other words, I have never had a desk to date since 1932. It is just mail-forwarding service.

Q. But they did forward mail to you from the Kansas City Warehouse Service Company?

A. Yes, sir.

Q. Did you inform that company of your itineraries from time to time so that they could forward your mail?

A. They used to accumulate it and then I would write them and tell them where I would be for the week-end. [58]

Q. I call your attention, Mr. Sanger, to Defendant's Exhibit A, which is the letter from you to Mr. Pendleton dated March 29th, 1940, also on the letterhead of Kansas City Warehouse Service Company; and I call your attention particularly to the paragraph numbered "6," on the first page of that letter, and ask you if that refreshes your recollection as to whether or not you had a desk or an office at any point?

A. This desk here refers to property that I owned, and you see the address is different, if you notice.

(Testimony of Lionel H. Sanger.)

Q. Yes, I noticed that.

A. And this desk here is when I moved over. I owned half of the property that was used at 1606 McGee St.

Q. I understood you to say a few moments ago that you never had a desk or an office at any particular spot.

A. It was owned by me in the operation of that particular warehouse. It was not used by me, my personal use desk.

Q. But in this letter of March, 1940, Exhibit A, you state as an argument against moving the warehouse: "I have my trunks, desk, files, and personal belongings all at 1729 McGee"?

A. That is correct; because I was not married and I had no residence to store anything, and I had all my personal belongings in there, and this desk, you know, things that I owned in operating that where I was half owner.

Q. But you did not use that as a base of operations? [59]

A. Well, they forwarded my mail, but I was not active in that warehouse.

Q. Did the other lines which you represented at that time do their warehousing also at this Kansas City Warehouse Service Company?

A. Some did.

Q. The Plomb Tool Company line was not the only one of yours, then, that was warehoused there?

A. I think there were others at that time.

The Court: Please speak up, Mr. Sanger.

(Testimony of Lionel H. Sanger.)

A. There were others at that time. I am sorry.

Mr. Wall: I am showing him item 16, Mr. Kenny.

Q. This, Mr. Sanger, is a memorandum on the Plomb Tool Company inter-office memo form, dated June 24, 1941, addressed to you from "Kirwin" and bearing at the bottom of it a typewritten paragraph after which is the typewritten word "Lionel." Did you type or cause to be typed that latter part on the document? A. Yes, sir; I think I did.

Mr. Wall: I will offer this into evidence as Defendant's Exhibit F.

The Court: Is there objection?

Mr. Kenny: No objection.

The Court: Received into evidence.

Q. (By Mr. Wall): I would like to call your attention [60] to the language of this paragraph on the bottom of this memo, Exhibit F, that you have just stated you put on there, in which you say:

"No doubt you realize how important it is to me to have the stock in the same warehouse where my office is located and my new office address after the fifteenth or twentieth of July will be 1817 McGee Street in the Automobile Row, where I belong and where our stock belongs."

Do you still say that you did not maintain an office in Kansas City, Mr. Sanger?

A. I never have in my life.

Q. What did you refer to, then, when you said here that it was important to have the stock in the same warehouse where your office is located?

(Testimony of Lionel H. Sanger.)

A. The Plomb Tool Co. was going to move their stock to the Thompson Products Warehouse, which they had done, I believe, nationally, if not 100 per cent, except Kansas City.

Q. You mean Thompson Products Warehouse is a nation-wide organization?

A. It is a nation-wide organization, and Thompson Products would not forward mail for me, and I had had very bad reports on their service there. The customers didn't like the move and it would be difficult for me having no mail-forwarding service. I have never paid for any office in my [61] life. It is just that service they render, most warehouses render.

Q. Insofar as you had an office, it was located there at that warehouse, is that true?

A. I never had an office. All I had was mail forwarding. I have never had a chair, desk, or anything like an office, still don't.

Q. You opposed, did you not, the proposal that Plomb move its stock? A. Correct.

Q. To the Thompson Products Warehouse?

A. Yes, sir.

Q. You preferred, as you stated here, that it be kept where you had your mail-forwarding service?

A. Or moved to 1817, where I was going to move, because we were definitely moving from where I was at.

Q. You mean the warehouse company?

A. No, Plomb was going to move.

(Testimony of Lionel H. Sanger.)

Mr. Wall: I see. I would like to back up to item 15, Mr. Kenny.

Q. This is a letter, Mr. Sanger, on the letterhead of "The Sheridan Hotel" in Minneapolis, dated February 9, 1941, addressed to "Dear Glen," and signed by you. Do you recall signing that letter?

A. Yes, sir. [62]

Q. Is the "Dear Glen" referred to there Glen Crandall of the Plomb Tool?

A. Glen Crandall.

Mr. Wall: I will offer this as the Defendant's Exhibit next in order.

Mr. Kenny: No objection.

The Court: Received into evidence.

The Clerk: G.

Q. (By Mr. Wall): Next I will show you what is item 17 on the stipulation and which is a letter dated June 26, 1941, again addressed "Dear Glen," and signed "Lionel," on the letterhead of "Lionel H. Sanger." Do you recall signing that letter, Mr. Sanger?

A. Yes, sir.

Q. I take it that that relates, again, to this Thompson Warehouse move that you have already mentioned, is that correct?

A. Yes, sir.

Q. Now I call your attention to this letterhead. Was this your own personal business letterhead, Mr. Sanger?

A. That is my own personal letterhead.

Q. I note that at the top it says "Lionel H. Sanger" and gives your address and telephone number. Was that the address of this warehouse?

(Testimony of Lionel H. Sanger.)

A. That is the address of Plomb Tool warehouse. All my letterheads right straight through are the same address as [63] Plomb Tool warehouse.

Q. When you say "Plomb Tool warehouse" you mean where Plomb at the time was keeping its stock?

A. Keeping its stock.

Q. I note at the bottom of that letterhead in printing is the following legend: "Serving the automotive and industrial jobber."

A. Yes, sir.

Mr. Wall: I will offer this letter of June 26, 1941, item 17, as Defendant's next exhibit in order.

The Clerk: H.

The Court: Is there objection?

Mr. Kenny: No.

The Court: Received into evidence.

Mr. Wall: May I have Plaintiff's Exhibit 12? I have a photostatic copy of it now. Perhaps I can show that to the witness.

Q. I show you, Mr. Sanger, a photostatic copy of Exhibit 12 which was introduced by your counsel this morning, being a memorandum from Dillon Stevens to you dated February 20, 1940, on the subject of "Understanding Instructions—9800 Deal." Can you tell me from that memorandum and from your recollection what this "9800 deal" was?

A. Yes, sir. Up just previous to that date Plomb Tool Co. was not in a competitive position on screw drivers, and I [64] suggested to the company that they take several and put them in a display card and have a jobber buy so many of those on a deal. It happened to be the number of 9800 series of screwdrivers.

(Testimony of Lionel H. Sanger.)

Q. That was simply the number of the series of the numbers of tools involved? A. Yes, sir.

Q. And they accepted your suggestion, did they?

A. And they accepted the suggestion. It increased the sales volume.

Q. And I take it from this memorandum, Exhibit 12, that when the instructions came out on the deal, somehow or other you misunderstood them, is that correct? Isn't that the sole purpose of that memorandum?

A. It looks like a letter in answer to "How many can you sell"? or something to that effect.

Q. It all had to do simply with the arrangements for this particular merchandising deal which was being made available by the company at your suggestion, isn't that true?

A. That is correct.

Q. I refer again, if I may, Mr. Sanger, to Defendant's Exhibit E, which is the letter of January 16, 1941, on the Kansas City Warehouse Service Co. stationery. I note that that has your name printed in the upper left-hand corner. You used that stationery part of the time, and part of the time [65] you used your "Lionel H. Sanger" stationery that we have already seen, is that correct?

A. That, and then Plomb stationery when I had both. Plomb furnished me stationery with their name on, too.

Mr. Wall: I see. Item 22, Mr. Kenny.

Q. I show you, Mr. Sanger, a series of letters which make up item 22 in the Stipulation of Facts,

(Testimony of Lionel H. Sanger.)

the first being a letter on the letterhead of The Roosevelt Hotel in St. Louis, dated January 12, 1941, addressed "Dear Dillon," and signed "Lionel." Is that your signature?

A. Yes, sir.

Q. And "Dillon," I take it, is Dillon Stevens?

A. Yes, sir.

Q. And this letter refers to correspondence with the Miniature Train & Railroad Co. and states that there are enclosed with it several letters from that company, one being dated May 19, 1939, to you from that company; another letter being dated August 14, 1939, to you from that company; the next being dated May 3, 1940; and the last being dated January 8, 1941, all running from Miniature Train & Railroad Co. to you. Do you recall the transaction that that letter to Mr. Stevens relates to?

A. Yes, I do.

Q. Can you state in general what the transaction was?

A. I left this gentleman—Mr. Sturtevant, I think [66] his name is, that owned the Miniature Train & Railroad Company; and he is an inventor that invented a new torque type wrench which appeared to be a very good tool number. So I sold some for him. I mentioned it, I believe to Mr. Kerwin, and he asked to see if I could get the line for some of the Plomb Tool representatives, which I did. A number of us sold this wrench. Then I suggested to Plomb, after I saw it was going so well, that they put the wrench in their line.

(Testimony of Lionel H. Sanger.)

Q. You mean that they manufacture it or that they simply market it?

A. No, that they buy it from Miniature Train & Railroad Company. And I suggested to Mr. Sturtevant and he would have a better sales organization if he would turn the wrench over to Plomb. He said he wouldn't want to turn over the whole factory, but he would sell Plomb on a basis where their men could handle it and resell the tool. And he said he would give me \$100.00 when the deal was consummated if Plomb did accept it as a Plomb item under the Plomb name.

Q. That was to be compensation from his company to you for putting the deal together, is that right? A. Right.

Q. And then, as I take it from this letter, he did not pay you and you asked Plomb to pay you, is that correct?

A. I asked Plomb to see if they could collect—not "collect" so much, as deduct the \$100.00 from what they paid [67] Mr. Sturtevant.

Q. Did you eventually receive the \$100.00 from Plomb Tool Company?

A. From Plomb Tool Company.

Mr. Wall: I will offer these five letters as one exhibit next in order.

The Court: Item 22?

Mr. Wall: That is correct, your Honor.

The Court: Is there objection?

Mr. Kenny: No.

The Court: Received into evidence.

(Testimony of Lionel H. Sanger.)

The Clerk: It will be Exhibit I.

Q. (By Mr. Wall): Mr. Sanger, were you aware that the Plomb Tool Company had a profit-sharing plan available for its employees during the year 1942? A. Yes, sir.

Q. Were you ever a participant in that profit-sharing plan?

A. You mean—I don't know if I am quite acquainted with it. Is that where you deposit so much money out of our commission check? Is that what you mean?

Q. No. I think it was a bonus type of profit-sharing plan. Did you ever participate in any such plan with the Plomb Tool Company?

A. I don't know. Are you referring to where we deposited [68] money to loan out to employees?

Q. No, no. I am referring to what is known as the profit-sharing plan of the Plomb Tool?

A. I am not familiar with it.

Q. Were you aware that the Plomb Tool Company had certain group insurance premiums available for its employees in 1942?

A. Yes, I was offered that.

Q. Did you participate in that?

A. No, sir.

Q. Were you aware of the retirement plan that the Plomb Tool Company had at that time?

A. I do recall something on retirement, yes, sir, but instead, I took out my own with Mr. Dillon Stevens of the Plomb Tool Company.

(Testimony of Lionel H. Sanger.)

Q. But that was not in his capacity as an officer of the Plomb Tool Company, is that true?

A. Well, he sold insurance in addition to being in the Plomb Tool Company.

Q. I mean the insurance was not connected with the Plomb Tool Company that you bought from him?

A. No, sir.

Q. Now, Mr. Sanger, I would like to show you photostatic copies of your income tax returns which your counsel has made available to me. First of all is a photostatic copy of a [69] certified copy of what purports to be your Federal income tax return for 1941. I believe you obtained this copy from the Government?

A. Yes, sir.

Q. Having misplaced your own retained copy?

A. Yes, sir.

Q. And is that your income tax return for 1941?

A. It is.

Q. You signed that at the bottom here where your signature appears?

A. Yes, sir.

Q. Did you prepare the return yourself, Mr. Sanger?

A. I always take it down to the Federal Building and have one of the income tax men fill them out.

Q. What about this statement "Commissions Received" that appears as an attachment to it? Is that in your handwriting?

A. That is in my handwriting.

Q. Is that same true of this "Statement of Traveling Expense" attached to it?

(Testimony of Lionel H. Sanger.)

A. That is typewritten.

Q. I mean the filled-in blanks, the hand-written portion, that is in your handwriting?

A. Yes, sir.

Q. I notice there after "Nature of Business" you have [70] stated "Manufacturers Agent"?

A. Yes, sir. I had "salesman" down and he said, "Well, you have more than one line." He said that would be confusing, and that was at his suggestion. And then I didn't have it alone one year, if you noticed. One year it is "salesman" and the next year I think it is "representative" and another one is "agent."

Mr. Wall: We will look at them, Mr. Sanger. I would like to offer the photostatic copy of the plaintiff's income tax return for 1941 as the defendant's exhibit next in order.

Mr. Kenny: No objection.

The Court: Received into evidence.

The Clerk: J.

Q. (By Mr. Wall): Now I show you a photostatic copy, Mr. Sanger, of what is apparently your retained copy of your 1942 return, is that correct?

A. Yes, sir.

Q. I note there that on the first page of the return where it asks for "(occupation)" you have stated "Manufacturer's Repr." Is that correct?

A. Yes, sir.

Q. And you have attached, as in the case of the other, a separate sheet showing "Commissions Re-

(Testimony of Lionel H. Sanger.)

ceived" from Plomb Tool Co. and from the other companies that you represented?

A. Yes, sir. [71]

Q. And you have also attached a second sheet entitled "Statement of Traveling Expense" and at the top it says "Name, Lionel H. Sanger; Nature of Business, Manufacturers Rep.," is that correct?

A. Yes, sir.

Mr. Wall: I will offer the 1942 return as Defendant's next exhibit in order.

The Clerk: K.

Mr. Kenny: No objection.

The Court: Received into evidence.

Q. (By Mr. Wall): I show you a photostatic copy of your retained copy of your 1946 Federal income tax return, Mr. Sanger, and I note there that you have designated your occupation on the first page as "Mfg. Rep.," again, is that correct?

A. Yes, sir.

Q. And again you have attached separate sheets showing income from various companies and business expenses? A. Yes, sir.

Q. And on the "Business Expenses" sheet you state "Nature of Business * * * Manufacturers Agent"? A. Yes, sir.

Mr. Wall: This is 1946. I will offer the 1946 return as the defendant's next exhibit in order.

The Clerk: L. [72]

Mr. Kenny: No objection.

The Court: Received into evidence.

Q. (By Mr. Wall): I now show you a photostat

(Testimony of Lionel H. Sanger.)

of your retained copy of your 1947 return, on which I note that you have described your occupation as "Manufacturer's Agent." This time you have filled out the schedule of the return on "Profit (or Loss) from Business or Profession" and have stated the nature of your business as "Manufacturer's Agent"? A. Yes, sir.

Q. And you have attached a separate sheet showing your "Income" from the various companies that you were representing during that year?

A. Yes, sir.

Q. And likewise a separate sheet on "Business Expenses"? A. Yes, sir.

Mr. Wall: I offer the 1947 return.

The Clerk: Exhibit M.

The Court: Received into evidence.

Q. (By Mr. Wall): I show you photostatic copy of your retained copy of the 1948 income, which likewise describes your occupation on the first page as Manufacturer's Agent, and also the same designation being on the sheet regarding "Business Expenses"? A. Yes, sir.

Mr. Wall: I offer this as the Defendant's next exhibit [73] in order.

Mr. Kenny: No objection.

The Court: Received into evidence.

The Clerk: N.

Q. (By Mr. Wall): Now I show you a photostat of your retained copy of your 1949 return, Mr. Sanger, which again describes your occupation as being "manufacturer's agent" and states that you

(Testimony of Lionel H. Sanger.)

have no social security number, on the first page, is that correct? A. Yes, sir.

Q. And you have again attached a separate sheet showing sources of income from various companies that you represented during 1949, is that right?

A. Yes, sir.

Q. Now, on the second separate sheet that you have attached, entitled "Deductible Expenses," as I mentioned to your counsel this morning and to you before court, an adding machine check of the total of the figures listed there as expenses shows a total of \$11,364.46 as against the total of \$15,748.15 that you have on that sheet.

A. The reason for that is the money that I paid to Mr. E. J. Geary who is now working for me. When I copied this, I copied it pretty quickly and there was another sheet which should have been attached on here which shows what I paid him, and that is the difference between it. [74]

Q. Do you recall the basis on which you paid Mr. Geary? A. Yes.

Q. Was it a flat salary basis?

A. \$400 per month.

Q. \$400 per month?

A. And that is against commission, but he didn't work a full year. So I think that is the reason for that variation there.

Q. The discrepancy between the adding machine and your total is \$4,383.69? A. That is right.

(Testimony of Lionel H. Sanger.)

Q. You think that amount was paid to Mr. Geary? A. Yes, sir.

Q. But not included on this list?

A. That is correct.

Mr. Wall: I will offer the 1949 return as Defendant's next exhibit in order.

Mr. Kenny: No objection.

The Court: Received into evidence.

The Clerk: O.

Q. (By Mr. Wall): Have you had audits by the Bureau of Internal Revenue with respect to any of these income tax returns: 1941, 1942, or 1946 to 1949, inclusive?

A. I don't follow you. You mean where they called me in or something? [75]

Q. Yes. Have you had any audit in the sense of having any changes made in your income tax returns by the Government for those particular years?

A. No.

Q. And I take it that those returns correctly reflect the income received by you from the various sources shown there? A. That is correct.

Q. And I take it also that they correctly reflect your business expenses incurred during those years?

A. That is correct, up through, I think it was in 1942 I was called in and asked just a question regarding the laundry or something that was on there, and then they passed it and said that was all.

Q. No changes were made in the return?

A. No changes were made in it.

Q. I show you now, Mr. Sanger, a typewritten

(Testimony of Lionel H. Sanger.)

copy of a letter from you to your counsel, Mr. Morris, purporting to set forth your income for, I believe, the first 11 months of the year 1950, which he has furnished to me. Does that total of \$19,433.07 correctly reflect the income received by you during the first 11 months of 1950? A. Yes, sir.

Q. I note you state there "Salary paid out \$4,860.00"? A. Yes, sir. [76]

Q. To whom was that paid?

A. Mr. E. J. Geary.

Q. That is the same man who was employed by you during 1949, I take it? A. Yes, sir.

Q. Then you have "Expenses for traveling, etc. \$9,187.63"?

A. Yes, that is correct. It should have had everything figured in there, not to the penny, because I don't have my complete report. That is the actual income but I totaled my expenses in my head. It would not vary \$100.00 on that.

Q. That is, the expenses, allowing for not being exactly accurate, is that correct?

A. Yes. It would not be off any amount, but maybe some amount up to \$100.00.

Mr. Wall: Very well. I would like to offer the copy of this letter into evidence as defendant's next exhibit in order.

The Clerk: P.

The Court: Received into evidence.

Q. (By Mr. Wall): Calling your attention to Exhibit J, which is your 1941 return, Mr. Sanger—and this is another photostatic copy of it—I note

(Testimony of Lionel H. Sanger.)

that you have in one of the sheets attached there a heading "Salaries & Commissions Paid Out" and you have three names there: "A. C. Towne \$369.78." Who was Mr. Towne? What did he do for you?

A. Oh, Mr. Towne was the gentleman who was the partner [77] in that warehouse that I owned.

Q. In the Kansas City Warehouse Service Co.?

A. The Kansas City Warehouse. And he had lines. He was representing different factories, and when he sold out he was the one who gave me the Powell Muffler line and the Eis Motor Products Line, and that is what I paid him.

Q. You paid him that for those lines, is that it?

A. Yes.

Q. For turning the lines over to you?

A. Yes. He said that he would make efforts to sell the companies to let me represent them, sell the factories, if I would pay him one-half, I think it was six months' commissions, one half per cent.

Q. In other words, this \$369 amount that you paid Mr. Towne represented a portion of your commissions? A. That is correct.

Q. Earned on the line that he turned over to you, is that correct? A. That is correct.

Q. It was simply a deal you had made with him in connection with the transfer of the line?

A. That is correct.

Q. What about J. Miller, the next gentleman named there; you paid him \$315.00 according to the exhibit.

A. I paid him to do some missionary work.

(Testimony of Lionel H. Sanger.)

Q. And that is missionary work of the type you mentioned [78] here in helping your customers to resell your product? A. That is correct.

Q. I notice that you have "W. H. Wetz" and you paid him \$2,310.40. He was the assistant that you put on as your employee? A. Yes, sir.

Q. Did you pay him on a flat salary basis or how? A. I think I did.

Q. In any event you paid him during the year \$2,310.40? A. Yes, sir.

Q. Calling your attention to Exhibit K, which is your 1942 return, you have also there the item of "Salaries & Commissions Paid Out" and the only name there is "W. H. Wetz" for \$2,240. Was that the same flat salary arrangement?

A. Yes, sir, the same thing.

Q. Mr. Wetz was your only employee during that year of 1942? A. Yes, sir.

Q. In 1946, from your 1946 return which is Exhibit L, I do not find any deduction there for salaries paid. Did you have any employees during 1946?

A. No. I was not representing the Plomb. Wetz worked Plomb only when he was with me.

Q. So you had no employees, then, during 1946?

A. No, sir. [79]

Q. But in 1947, as indicated by Exhibit M, which is your 1947 return, you did pay \$1,300 in salary to Robert H. Callahan? A. Yes, sir.

Q. I take it he was employed to represent you

(Testimony of Lionel H. Sanger.)

in selling some of the lines that you then represented? A. That is correct.

Q. And in 1948, according to Exhibit N, your 1948 return, you paid R. H. Callahan \$100.00. I take it that is the same gentleman?

A. Yes, sir.

Q. And then you paid H. D. Farber \$2,107.80?

A. Yes, sir.

Q. Did Mr. Farber replace Mr. Callahan as your employee? A. That is correct.

Q. In 1949, although it was not shown by your return, you stated that you had another employee in that year? A. Mr. E. J. Geary.

Q. Mr. E. J. Geary. And you have him at the present time?

A. Yes, sir. He is still with me.

The Court: We will take the afternoon recess at this time.

Mr. Wall: Yes, your Honor.

(Short recess.) [80]

Q. (By Mr. Wall): Again referring to these income tax returns, Mr. Sanger, first, to Exhibit J, your 1941 return, as I understand it, that shows that you received during the year 1941 gross commissions of \$20,254.01, of which \$10,321.94 came from the defendant here? A. Yes, sir.

Q. And in 1942, as shown by Exhibit K, you received total gross commissions of \$24,141.56, of which \$14,830 came from the defendant, is that right? A. Yes, sir.

(Testimony of Lionel H. Sanger.)

Q. Against that, in each of those years, of course, you had certain expenses which you deducted in order to determine your net compensation. Skipping the year 1946, which was the first year after your return from the service, as shown by Exhibit L, your gross commissions received from all sources then was \$25,968, or slightly higher than in 1942?

A. Yes, sir.

Q. And then in 1947, as shown by Exhibit M, the gross income went up to \$27,277? A. Yes, sir.

Q. Then in 1948 there was a reduction to some extent in your total income which was \$22,900?

A. Yes, sir.

Q. Using gross figures all the way through?

A. Yes, sir. [81]

Q. And in 1949, the total from all of the firms that you represented was \$20,398?

A. Yes, sir.

Q. And in 1950, up to the end of November, the gross income, I believe, was somewhere around \$19,000 for this year up to date? A. Yes, sir.

Mr. Wall: We have prepared from Mr. Sanger's income tax returns which are now in evidence a summary showing of his earnings from each of the companies whom he represented in each of the years 1941, 1942, 1946 through 1949, and the first 11 months' figures for 1950. We have also taken from those income tax returns and from his statement for expenses, the business expenses shown on each of those returns, and have deducted the total expense from the total commissions in order to show his net

(Testimony of Lionel H. Sanger.)

earnings from personal services during each of those years in question.

I have furnished a copy to counsel for the plaintiff. I should like to offer this summary in evidence, subject to any corrections which may be indicated by a comparison with the income tax returns. We believe it to be correct.

The Court: Any objection to the summary?

Mr. Kenny: No objection. That is the same as our Exhibit 1, except we developed a few missing years.

The Court: Very well, received into [82] evidence.

Mr. Wall: Thank you, your Honor. I might say that there is one figure, being business expenses for the year 1949, which we have changed in pencil here. The figure which we originally had was the corrected figure on the addition there that I call to Mr. Sanger's attention, and we have now put in the total figure as shown by his return.

The Court: Very well.

The Clerk: Defendant's Exhibit Q.

Mr. Wall: There is one more exhibit which is referred to in the stipulation and is item 20.

The Court: According to my notes, items 9, 28, 23, and 24 have not been offered yet.

Mr. Wall: Items 9, 23, and 24 intentionally have not been offered by the defendant.

The Court: Items 9, 23, and 24 are not intended to be offered.

Mr. Wall: Item 20, the reply to which is already in evidence as Exhibit 25—is it? I would like to

(Testimony of Lionel H. Sanger.)

offer at this time item 20, which is a letter from Mr. Sanger to Chris dated December 17, 1942.

I show you that letter, Mr. Sanger. Who is Chris? Was that Miss Christensen? A. Yes.

The Court: Is there objection to the offer?

Mr. Kenny: No objection. [83]

The Court: It will be received as Defendant's Exhibit.

The Clerk: R.

Mr. Wall: I have no further questions, your Honor.

Redirect Examination

By Mr. Kenny.

Q. Mr. Sanger, who is Nate Needham whom you mentioned in your testimony under cross-examination?

A. Nate Needham is a former employee of the Plomb Tool Company who was assigned to me as an assistant by them.

Q. And that was in the years 1941 and 1942 that he was assigned to you as your assistant?

A. I don't recall the last date. It seems like '41. I think he died thereabouts.

Q. What did he do when he was assigned to you?

A. He would go to my customers and help their salesmen in disposing of merchandise, showing them how to sell Plomb Tools; and he would also assist me in repairing the display boards and checking catalogs to see if they were up to date, distributing small catalogs to the mechanics.

(Testimony of Lionel H. Sanger.)

Q. Repairing display board; would you tell the court what those display boards were?

A. The display boards were the boards that were furnished by the Plomb Tool Company to the jobber to be installed in the jobber's store, and they held the tools or a fraction of the tools for display purposes in that jobber's store. And it [84] was up to me as a salesman to keep that board in repair and clean. In other words, about once or twice a year, depending on the dust storms we had, all the tools would have to come down, those boards be washed and wiped off, sometimes revarnished and new brackets for new numbers of tools that were manufactured be installed on those boards.

Q. And did you do that work? A. Yes, sir.

Q. Were you furnished a special tool to do that?

A. I was furnished a complete tool kit with varnishes and paint and hammers and screwdrivers—everything necessary—and brackets.

Q. That kit was furnished you by the Plomb Tool Co.?

A. Yes, sir; and another kit with it to repair broken tools that the jobber would give us on regular calls.

Q. There was some discussion during cross-examination about your office in a warehouse in Kansas City. Did you ever have your name on any door or on any office in Kansas City? A. No, sir.

Q. Did you ever have a secretary?

A. No, sir.

(Testimony of Lionel H. Sanger.)

Q. Did you ever have anything other than a mail box in that office?

A. I didn't have a mail box. The mail would just be addressed there and the manager of the warehouse would [85] readdress it to where I was on the road.

Q. Now, you said that you bought insurance from Dillon Stevens?

A. Yes, sir.

Q. At that time Dillon Stevens was an employee of the company, the Plomb Tool Company?

A. He was the vice-president of the Plomb Tool Co.

Q. And on the side he sold insurance, was that it?

A. Yes, sir.

Q. That was his personal deal; the company was not in the insurance business?

A. Not to my knowledge.

Q. To the best of your knowledge?

A. No, sir.

Q. Are you ready to go to work for Plomb Tool Company if employment should be offered you at this time?

A. Yes, sir.

Q. Calling your attention——

The Court: Do you want to develop that in some detail?

Mr. Kenny: I think your Honor brings certain questions to my mind, but I think that answer is sufficient. I guess I could ask him the conclusion.

Q. Are you able to go to work for Plomb Tool Company at this time?

A. Yes, sir; I am able to. [86]

(Testimony of Lionel H. Sanger.)

The Court: Doing what and where and under what circumstances?

Q. (By Mr. Kenny): Under what circumstances would you be ready to go to work for Plomb Tool Company? What kind of an offer from Plomb Tool Company would you accept were it made now?

A. I would like to continue on my old basis. I tried to sell other tools since I was not re-employed, but it is pretty hard to do when I spent practically my whole life building Plomb. I go around and just can't seem to sell the others.

Q. Calling your attention to Exhibit P showing your 1950 income, there is an item of \$390.32 from Bingham Herbrand Corp. Is that a tool company?

A. That is a tool competitive to Plomb. I try to sell their line, to go around to old accounts where I have originally established the Plomb stocks. I just don't seem to be able to put up enough sales resistance against or to show reason enough why they should discontinue Plomb, because I was sold on Plomb myself and I still think it is the best tool manufactured.

Q. Are you still selling Bingham Herbrand tools? A. No, sir.

Q. You sold them in 1949 and 1950, but you did divest yourself of it sometime in 1950? [87]

A. I think it was a total of about eight or nine months.

Q. Of all these other accounts, none of them are tool accounts, is that correct?

A. The one line is Truecraft Tool Company, but

(Testimony of Lionel H. Sanger.)

they don't have the same type of tool as Plomb Tool Company. They have carpenters' tools which are not competitive to Plomb.

Q. Judge Mathes asked me the question and I in turn ask it to you: Under what conditions would you be willing now to go to work for Plomb Tool Company? In what territory, what lines, and whether or not you would be willing to work for them exclusively?

A. I would be. I would like my same territory back that I originally had.

Q. Would you be willing to work for them exclusively? A. Yes, sir, I would.

The Court: Would you work for them in any territory in the Middle West where the company wanted you to work?

A. I would, yes, sir. I would not like to change, but I would change.

Mr. Kenny: I did not get that.

The Witness: I said, I wouldn't like to change but I would change.

The Court: In other words, you would like your territory back or comparable territory? [88]

The Witness: Yes, sir.

The Court: If it would be the policy of the company to have the salesmen handle only that line, you would be willing to handle only that line?

The Witness: Yes, sir. I told that to Mr. Kerr at the time, and I also wrote him a letter there. There is a letter there I wrote and told him that, but I never heard from Mr. Kerr, and these offers

(Testimony of Lionel H. Sanger.)

they told me they made are all news to me. I am still waiting for an offer from the Plomb Tool Company.

Mr. Wall: For the purpose of the record, your Honor, I move to strike that testimony as contrary to the stipulation.

Mr. Kenny: I think we can examine the stipulation and the evidence, and I will stand on this testimony as offered as not being in conflict of the stipulation but in amplification of it.

The Court: Very well, the motion will be denied. As the court said before, unless I feel someone is relieved from the stipulation, I stand on the stipulation.

Mr. Wall: Thank you, your Honor.

Mr. Kenny: Yes. But I do not take it your Honor's position is that this is in conflict with the stipulation.

The Court: I am not passing upon that. As I said this morning, I do not care to sit down and try to measure these words against the words of the stipulation and determine [89] whether they amplify the stipulation or not. Out of whatever is said by this witness we will carve what is clear in the stipulation, and nothing will be permitted to conflict with the stipulation unless the party is relieved from it.

Mr. Kenny: No further questions.

The Court: Any recross?

Mr. Wall: One question if I may, your Honor.

(Testimony of Lionel H. Sanger.)

Recross-Examination

By Mr. Wall.

Q. As you have used this term, Mr. Sanger, on your redirect examination and in connection with this Nate Needham, do I understand that he was what you referred to in your cross-examination as a missionary man? A. Yes, sir.

Mr. Wall: I have no further questions.

The Court: You may step down, Mr. Sanger.

Mr. Kenny: A question has been suggested to me that might make it clear.

The Court: Just a moment.

The Witness: Yes, sir.

Mr. Kenny: Well, I think I might make that more clear from the documentary evidence that is in, rather than to produce it from this witness. And we have no further questions.

The Court: You may step down, Mr. [90] Sanger.

The Witness: Thank you, sir.

The Court: Plaintiff's next witness.

Mr. Kenny: I think as the only other matter for the plaintiff, we would like to have from the defendant the payments made to Mr. Freund or whoever else worked the territory that was formerly worked by Mr. Sanger, in the years 1946, '47, '48, '49, and the first 11 months of 1950.

Mr. Wall: Perhaps I had better tell you what I have and the form in which I have it, Mr. Kenny. I have here——

Mr. Kenny: Have you a copy of it?

Mr. Wall: Yes. I will hand it to you. And perhaps I had better explain it to you, because this apparently is going in on a stipulated basis, rather than the testimony.

The Court: Why not offer a stipulation on it, Mr. Wall? Suppose you offer a stipulation.

Mr. Wall: Very well. I offer to stipulate that the Plomb Tool Company paid to Mr. Freund the amounts of commission and reimbursed expenses shown on this sheet which I hold in my hand and which I will be happy to have marked as an exhibit, for the years there set forth, and those years are 1946, 1947, 1948, 1949, and the first 10 months of 1950 which is the latest figure we have, Mr. Kenny. You asked for 11 months.

Mr. Kenny: Yes. That is all right.

Mr. Wall: I should like to call attention to the fact [91] that this schedule which was made up for my purposes, and not Mr. Kenny's, shows the year 1949 broken down into the first nine months of the year separate from the last three months; then shows the total for the year, and it shows the first nine months of 1950 separate from October, 1950, that being to conform with our contention that if any damages are payable here, they are payable only with respect to the period after the filing of the complaint, which was in September of 1949, and only for the period of one year thereafter.

The Court: Do you accept the stipulation?

Mr. Kenny: Yes, we will accept that stipulation as far as it goes.

The Court: Do you wish to offer the document?

Mr. Kenny: And we will offer this as being the monies paid Mr. Freund.

Mr. Wall: Just before you offer it, Mr. Kenny, may I speak of something else, your Honor? We also have the monies paid to Mr. Freund by P & C Hand Forged Tool Company and Penens Corporation for the same periods of time, and I am perfectly happy to have those facts made available to the court.

I would state, in line with my comment in my opening statement, that we do not feel these figures on these three corporations during the period in question can properly be offered as a measure of damages, because the total of these [92] three would be to give Mr. Sanger the benefit of the exclusive representation job which he was offered and which he turned down.

Now, with that clarification——

The Court: Does it take the three of them to comprise what was one before the war? Is that it?

Mr. Wall: No, your Honor. These are on a different basis from what was one before the war. Before the war Mr. Sanger represented Plomb Tool Company. He did not represent Penens and P & C, but he did represent other accounts. The combination of these post-war figures for Plomb Tool Company, Penens and P & C represent the full-time efforts of the man who is in the job that Mr. Sanger was offered but which he turned down, together with

him having partial benefit, at least, of the assistance of other men who were also assigned to that territory.

The Court: Does the Plomb Tool Company income to this man Freund during these post-war few years indicate his earnings in a territory and under an arrangement which is comparable to that which the plaintiff had prior?

Mr. Wall: No, your Honor, they do not. They represent the earnings of Mr. Freund under an employment contract by which he spends his full time on sales of the products of Plomb Tool.

The Court: I am referring to Plomb Tool alone, now. My [93] question is directed to Plomb Tool Company products alone.

Mr. Wall: Well, I would answer it this way, your Honor: That the figures will show here the sales of Penens and P & C products are relatively small in comparison with the sales of Plomb products. I think I see what your Honor has in mind. This man sells three companies' products, and before the war Mr. Sanger sold six companies' products. To that extent there is a similarity, I agree with you.

The Court: I am referring only to the Plomb Tool Co. income. In other words, did he sell Plomb Tool Co. products under a comparable situation to that existing when the plaintiff sold?

Mr. Wall: He sold in a comparable territory, yes. He sold them on a commission, on the same general basis as Mr. Sanger did.

The Court: I am not referring to the business of the witness. I am referring to the arrangement.

Mr. Wall: The point I make is this, your Honor: Mr. Freund had less other things to do and he spent a greater portion of his time on Plomb Tool business, because he was employed 100 per cent on the business of Plomb and its two subsidiaries.

The Court: Wouldn't that go to the weight of it?

Mr. Wall: That may well be, and I am perfectly willing to have these figures presented to your Honor. I am simply [94] stating clarifications.

The Court: Do you wish to offer the schedule?

Mr. Kenny: I want to ask one question for the purpose of the stipulation, that is, that Penens and P & C are both wholly-owned subsidiaries of Plomb Tool.

Mr. Wall: That is correct. I will so stipulate.

The Court: As I understand, you have three separate sheets?

Mr. Wall: That is correct.

The Court: Three separate sets of schedules, one for——

Mr. Wall: P & C, one for Penens, and one for Plomb; that is correct.

The Court: Do you wish to offer all of them pursuant to the stipulation?

Mr. Kenny: Yes, I will now offer all three of those as a single exhibit.

The Court: They will be received as Plaintiff's Exhibit 48.

Mr. Kenny: Mr. Wall has been good enough to

explain the Exhibit 48 further. On the income from Plomb Tool the item shows commission and expense and his total take, and Mr. Freund's total take would be the two added together.

Mr. Wall: Correct. That, I think, is gross income; yes.

The Court: The expense column means an expense [95] allowance, is that it?

Mr. Wall: It is a reimbursement of expenses on expense accounts, your Honor; so that his gross earnings would be the total of the two columns in any particular year, and his net earnings after expenses would be the left-hand column.

The Court: Would be the "commission" column, wouldn't it?

Mr. Wall: That is correct.

The Court: So the "expense" column is merely a reimbursement column, is that it, reimbursement on a dollars and cents basis?

Mr. Wall: On the expenses, your Honor.

The Court: Yes, actual out-of-pocket expenses.

Mr. Wall: That is correct.

The Court: So we can disregard that, can we not?

Mr. Wall: I think so, as long as we are talking in terms of net.

The Court: It cancels itself out, doesn't it?

Mr. Kenny: It cancels itself out. Of course, Mr. Sanger's commissions in the old days were figured on what his gross was.

Mr. Wall: But we have through Mr. Sanger's income tax returns his net figures.

Mr. Kenny: Yes. I think for what it is worth, it will be very helpful. [96]

The Court: Very well.

Mr. Kenny: I do have one other problem, however, Mr. Wall. Does this cover all of the sales in the territory that was formerly Sanger's?

Mr. Wall: No.

Mr. Kenny: Can we develop that?

Mr. Wall: I seem to be testifying here. The territory, as is indicated in the stipulation, has at different times two, three or four men operating in the territory. The way it is set up is that one man in the territory, Mr. Freund, is the zone manager, and under the contractual arrangements between him and the defendant company he is entitled to commissions, basically entitled to commissions on all sales made into that zone. He has the privilege, however, with the company's approval, of asking the company to hire as an employee other men to assist him in the sales, and the zone manager, with the company's approval, can direct that a certain portion of the commissions earned by **the entire** zone be paid to these other men. But these figures that I have given you are the earnings of Mr. Freund, who is the zone manager, the head man, so to speak, in that zone, after there has been deducted from the total commissions earned in the zone the amounts which were actually paid as either salary or commissions to the additional salesmen operating in that territory, also as employees of the [97] defendant.

Mr. Kenny: Can you give us the figures, then,

that would be commissions earned by these other persons?

Mr. Wall: We can get those for you. I understood you wanted Mr. Freund's earnings.

Mr. Kenny: I did not know that Mr. Freund expanded to having other people participating in that money which was formerly derived from that area.

Mr. Wall: We have those figures, of course. I would say this, though, that I do not think the total zone earnings give a basis of comparison at all because that would represent the efforts of three or four men without deduction for the compensation which is paid to those men.

In other words, my theory is that if Mr. Sanger had taken the job that was offered to him, he would have had the job Mr. Freund has, but presumably he would not have been able to produce that much business all by himself; he would have had to pay other people to do it.

Mr. Kenny: I am putting that argument aside for later. I wanted, before I rested, to leave the trial open to those figures and subject to those figures coming in. We can then see where the figures lead us for argument later.

The Court: Wait just a moment. Do you wish to offer Plaintiff's Exhibit 1 for identification before you rest?

Mr. Kenny: Yes, I do.

Mr. Wall: I will renew my objection to the portions that [98] relate to the period prior to 1940 and to the portion that relates to the period during the war.

Mr. Kenny: We submit that there is no argument as to where the figures are derived from. It merely goes to their materiality.

Mr. Wall: That is right.

The Court: What is the purpose of the offer as to the years during which the plaintiff was in the service?

Mr. Kenny: Merely to illuminate his problem. The central problem, I think, that we have on these negotiations for reemployment was what his problem was as to disposing of other lines. And he has said, "Look, I can't get rid of them. They carried me during the war. I have got to have some notice to get rid of them." And this merely verifies that they were very generous in carrying him during that time.

The Court: Very well, objection will be overruled and Plaintiff's Exhibit 1 for identification will be received into evidence.

On the Schedule of Exhibits I direct attention to the fact that, according to my notes, Exhibits 9, 23, and 24 have not yet been offered.

Mr. Kenny: I think neither side desires to offer them.

Mr. Wall: That is correct, your Honor.

The Court: Very well. The plaintiff now rests?

Mr. Kenny: We rest, subject to these other figures as [99] to the other men which can be supplied.

Mr. Wall: I can have them for you in the morning. Do you want them broken down as to individual men?

Mr. Kenny: I would just as soon have them lumped together as a figure.

The Court: How much time will you require for the defendant's evidence?

Mr. Wall: For the defendant's evidence, your Honor, I would think we will probably require two and one-half or three hours.

The Court: Any objection to resuming at 9:30 tomorrow morning?

Mr. Wall: That is quite satisfactory, your Honor.

The Court: Is that agreeable to plaintiff to resume at 9:30 tomorrow morning?

Mr. Kenny: Very good, thank you.

The Court: Very well, we will take the recess at this time until tomorrow morning at 9:30. Court will adjourn.

(Whereupon a recess was taken until 9:30 o'clock of the following day, Wednesday, December 20, 1950.) [100]

Wednesday, December 20, 1950—10:00 A.M.

The Court: You may proceed in the case on trial.

Mr. Wall: May I express my appreciation for your Honor's indulgence in postponing the opening to 10 o'clock. I appreciate it.

Yesterday afternoon, your Honor, Mr. Kenny requested that we furnish him with figures on the earnings of the entire zone, which is substantially the territory which was formerly assigned to Mr. Sanger. I now have those figures.

Mr. Kenny: I suggest that I be handed them now. I can let my client examine them while witnesses are being examined, then we can ask what questions are necessary before they are introduced.

The Court: Very well.

Mr. Wall: I will hand you three sheets with two copies each, Mr. Kenny, one showing "Commissions and Reimbursed Expenses" paid to that territory by the Plomb Tool Company, and broken down to show the amounts paid to each of the salesmen, including Mr. Freund whose figures were given to you yesterday. The same break-down is made for P & C Hand Forged Tool Company on another sheet, and a similar breakdown for the Penens Corporation on another sheet covering the period from 1946 to the end of October, 1950.

The Court: Thank you. [102]

Mr. Wall: Do I understand, then, that the plaintiff has rested?

Mr. Kenny: We will have rested when we have these in. We have no other testimony, merely these figures on the issue.

Mr. Wall: Do you wish to put those in now?

Mr. Kenny: I want my client to have an opportunity to look at them, because these figures mean a lot more to him than they do to me.

Mr. Wall: Shall I proceed with our case, then?

The Court: Yes, you may.

Defense

Mr. Wall: I will call Mr. Robert W. Kerr.

ROBERT W. KERR,

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Robert W. Kerr, K-e-r-r.

Direct Examination

By Mr. Wall.

Q. What is your present business or occupation, Mr. Kerr?

A. I am the vice-president of the Bingham Herbrand Corporation.

Q. What is the business of the Bingham Herbrand Corporation? [103]

A. They are manufacturers of steel products, forgings, stampings, and tools.

Q. Is that corporation in competition with the Plomb Tool Company, the defendant in this action?

A. Yes, in part it is.

Q. You were formerly connected with the Plomb Tool Company, I believe?

A. I was executive vice-president of Plomb.

Q. When did you sever your connection with Plomb Tool Company? A. March, 1948.

Q. In January, 1946, were you then vice-president of Plomb Tool Company? A. Yes, I was.

Q. In that capacity were you in charge of the sales activities of the company?

A. That is correct.

(Testimony of Robert W. Kerr.)

Q. Were you connected with the sales activities of the company in the period 1941-1942?

A. No, I was not.

Q. You were employed by the company at that time?

A. That is correct. I was the treasurer of the company at that time.

Q. At that time I believe Mr. Dillon Stevens was the salesmanager, entitled vice-president in charge of sales, is that correct? [104]

A. That is correct.

Q. When did you take over the supervision of the sales activities of Plomb Tool Company, if you recall?

A. In September of 1944.

Q. At that time, Mr. Kerr, in September of 1944 when you took over the sales management job, if I may use that term, what was the policy of the company with respect to arrangements that it had between itself and sales representatives selling its products?

A. You mean as to the status of the employment of such representative?

Q. That is right.

A. Well, at that time the company, of course, in the period from 1940 on had substantially expanded its production and distribution, and as a part of the program they had converted their sales organization largely from manufacturers' agents or independent contractors to direct employees of the company.

Q. Are you familiar with the circumstances which led to that conversion?

(Testimony of Robert W. Kerr.)

A. Yes, in general I am. I was not a part of it originally but I know why it was done.

Q. You were an officer of the company, though, at the time the change was made?

A. That is correct. [105]

Q. Can you state generally what those circumstances were?

A. Well, the principal reasons for it were, in the first place, the sales management at the time felt that because of the increased activity, the expanded sales, it was necessary to have the field organization under their direct control, which had not been true of the manufacturers' agents.

In addition to that there had been growing for some time and, in fact, had continued through a period of years there, and still exists, feeling on the part of many of the customers of that company as well as others in the same field that they preferred to deal with men who were direct representatives of the company and under their control. Those were the two principal reasons. Tied into that, of course, was the fact that where previously the company was small, its sales were not large enough to in some cases justify the expense of a direct representative, but those circumstances have changed.

Q. Do you know, Mr. Kerr, when the change of policy was put into effect?

A. As I recall, it was January of 1941. It was either 1941 or '42. I am not certain of it. I would have to check the records.

(Testimony of Robert W. Kerr.)

Q. Are you acquainted with Mr. Lionel Sanger, the plaintiff in this case?

A. Yes, very well. [106]

Q. You have known Mr. Sanger for some years, I take it? A. Since 1938.

Q. You were aware of the fact, I assume, then, when he went into the Navy service in the year 1942? A. That is correct.

Q. Did you have a conversation or several conversations with Mr. Sanger in January of 1946?

A. Yes, several of them.

Q. Where were those conversations held?

A. In Los Angeles at the Plomb Tool Company headquarters.

Q. Directing your attention to the first of what you have referred to as several conversations, will you state in general what—in the first place, who was present, if you recall? Was there anyone there besides yourself and Mr. Sanger?

A. Well, as I recall, on the majority of the occasions they were conversations between Mr. Sanger and myself, although on various occasions Mr. Pendleton, the president of the company, sat in with us; and on one or two occasions, as I recall, Morris Mautner, who was the personnel director of the company, participated in the discussion.

Q. Will you state in general what was said by Mr. Sanger and by you in the first of these conversations?

A. Well, these conversations, of course, resulted from earlier conversation in Chicago. In December

(Testimony of Robert W. Kerr.)

of 1945 there had been a meeting there of the automotive service [107] industries, the first one following the war activity.

Q. Was that a regular annual meeting?

A. That was a regular annual meeting; that is correct. It had been suspended during the war and this was the resumption of it. And Mr. Sanger came to me at that time and then said that he would like to go back to work for Plomb. He was wondering when he could be reinstated. And at that time I explained to him what our present or our then existing policy was, and we were under conditions where it was not easy to talk. He told me he was coming out to the West Coast later, and we agreed that we would talk the thing over then.

Q. So then I take it he did come out to the West Coast and you saw him here in January, is that correct?

A. That is correct, yes.

Q. Now, will you state the substance of the conversations between you and Mr. Sanger here along in January of 1946?

A. Well, Mr. Sanger came in then and said he was ready and willing to go back to work. And again I explained to him the change in the policy of the company, told him that as far as I was concerned and, I believe, as far as the company was concerned, we would like very much to have Mr. Sanger back, but pointed out that in the interval between the time he had left and January of 1946, due to circumstances which I explained and which have been discussed here, that we had [108] converted to our own

(Testimony of Robert W. Kerr.)

direct sales force; that the territory which he had previously covered on a part-time basis, carrying his other lines, was now being handled by three full-time men; that our distribution, of course, was much larger, our over-all program throughout the country was much larger; and that if he came back to the Plomb organization that it would have to be on a full-time basis.

Q. Did you tell him at that time, Mr. Kerr, that he could come back to the Plomb organization, taking that territory on a full-time basis as you have mentioned?

A. Well, that is correct. We discussed a good many possibilities at the time, and the stumbling block, of course, was the full-time basis.

Q. What did Mr. Sanger say, if anything, with respect to his willingness or unwillingness to come back on the full-time basis?

A. Well, his position was that several of the companies that he had previously represented and was continuing to represent as of that time—I recall particularly the Wohlert Company was one of them—had kept him on their payroll during the war, had compensated him to some extent during that period, and as a result he felt obligated to them, and therefore was unwilling to take the step that he felt would not be fair to them. In other words, he was unwilling to give up his other lines. [109]

Q. Now, you said, I believe, that in addition to his former Kansas City territory, if I may refer to it in those terms, you discussed other possibilities.

(Testimony of Robert W. Kerr.)

Will you tell us what you discussed in the way of other possibilities?

A. Well, as I said earlier, there were a good many conversations over a period of several days. In fact, as I recall, it ran for a couple of weeks. And we discussed the possibilities of the Kansas City territory. I made it clear at the time that if he went back to that territory, it would have to be on a full-time basis and with the additional manpower on the same basis as then existed.

Q. What do you mean by that, Mr. Kerr?

A. Well, at that time we had the three full-time men, a man by the name of Freund, who was the district manager, and he had two men working full time for him covering that territory.

Q. Do you mean by what you have said, then, that you told Mr. Sanger that if he took that territory he would become the district manager, but you would expect him to have as many assistants in the territory as Mr. Freund then had?

A. Well, that was always stipulated and understood; that is correct.

Q. What other possibilities did you explore?

A. We also explored the possibility of the so-called Chicago territory, which at that time was not functioning to [110] our liking, and we made a proposal on that; in other words, offered him that, and in connection with it, it was agreed that at least temporarily that one would give him an opportunity to carry his other lines until he could in a fair way give them up. In other words, to make

(Testimony of Robert W. Kerr.)

myself clear there, the Kansas City territory had become a very active territory. It required considerable attention, and as a matter of fact the three men who were then covering it were not giving the type of coverage that we felt it should have. The Chicago territory, on the other hand, was one that had not had the same type of attention as had been given Kansas City, and I had a good deal of respect for Mr. Sanger's ability, and proposed that as a possibility, with the understanding that in that case he would have an opportunity to release his other lines gradually.

Q. Did Mr. Sanger ask you for the right to continue his other lines over any specific period of time in connection with these discussions?

A. There was never any specific time suggested, although—and I do not recall whether it was in the conversations in Los Angeles or subsequently in Kansas City—that he said that he would have to have it at least a year before he would give up the other lines.

Q. You were not present in the courtroom yesterday, were you, Mr. Kerr? [111]

A. No. I did not——

Q. Did you hear Mr. Sanger's testimony?

A. No.

Q. I believe I can paraphrase Mr. Sanger's testimony accurately. Yesterday he testified in connection with these discussions that he had asked for time within which to sever his connections with his

(Testimony of Robert W. Kerr.)

other lines, and that you refused to give him any time, I believe is what he said. Is that or is that not a fact?

A. Well, in connection with the Kansas City territory my recollection is that that was correct, that we agreed, naturally, the assumption all the way along would be that it would have taken a short time, 30 days or thereabouts, to release the other lines in which he was active, but we were unwilling in that particular territory, which needed full-time representation, to give any extended time such as apparently he would want.

Q. Such as a year that you mentioned?

A. That is correct.

Q. In the course of these discussions in Los Angeles in January of 1946, Mr. Kerr, did you discuss with Mr. Sanger the commission rates which the company then had in effect in the Kansas City territory?

A. Yes, that is correct. We explained the change that had been made there. [112]

Q. What did you tell him in that regard?

A. Well, early in 1944—well, I am not certain of the date of that, again—but during that period prior to the time that I took over the sales organization we had established a new policy. The company felt that with the termination of war facing it, that it was going to have to aggressively campaign for additional distribution, and this new program was set up which involved two major steps; one of them was the reduction in prices on the tools that were sold, and the other one a reduction in the

(Testimony of Robert W. Kerr.)

rates of commission that were paid, the theory being that the lower prices and the additional merchandising activity would increase volume and that the men on the lower rates of commission would actually make more money than they had before; and, of course, that proved to be true.

Q. Do I understand, then, that the commission rates in effect in the company in January of 1946 were lower than those which had been in effect in 1942 when Mr. Sanger left?

A. That is correct. As I recall, the commission rate in Mr. Sanger's territory had been 10 per cent at the time he left. Prior to that it had even been more. Under the new program that was reduced to seven and one-half per cent.

Q. And you discussed this change of commission rate with Mr. Sanger in January?

A. That is correct; yes. [113]

Q. I believe you mentioned, Mr. Kerr, that Mr. Freund was in January, 1946, district manager of the Kansas City territory?

A. That is correct.

Q. And that there were other men also working in that territory?

A. That is right.

Q. Did you explain to Mr. Sanger in January, '46, the basis of your then setup on the handling of the territory by one district manager in several districts?

A. Yes. That was discussed at length on several occasions.

(Testimony of Robert W. Kerr.)

Q. Will you state as briefly as you can what you told him in that regard?

A. Well, again, the same story, that because of the new program we required the—in other words, we had set up a district arrangement, of which that Kansas City territory became one, with a district manager in charge, and depending upon the sales potential of each district, the district manager was required to carry in his organization and share in the earnings of the territory these other full-time men. In that particular territory it happened to be at the time two men.

Q. Were these other two men, the assistants to the district manager, so to speak, were they employees of the Plomb Tool Company at that [114] time?

A. Yes, they were.

Q. And how were they compensated?

A. They received a share of the earnings of the territory.

Q. How was that share determined?

A. Well, again, that was arbitrarily determined on the basis of the volume produced in the territory. It depended upon the number of men involved and the amount of earnings. As I recall in that territory, with the three men, Mr. Freund, the district manager, my recollection was that he received 40 per cent of the earnings and the other two men 30. That may not be correct because the percentages varied in different territories.

Q. Were these percentages set up by agreement

(Testimony of Robert W. Kerr.)

between the district manager and the company, if you recall?

A. That is right, and the men involved.

Q. In other words, as I understand it, then, the earnings of the particular territory or district in the form of commissions were divided between the manager and the other salesmen in the territory in accordance with an agreed ratio or something of that sort?

A. That is right. The procedure was, the earnings for the territory were computed, the men reported their expenses, those were deducted, and then the remainder was divided according to a pre-determined formula. [115]

Q. And did you explain that basis of arrangement to Mr. Sanger in January? A. Oh, yes.

Q. Did you tell Mr. Sanger in January of 1946 that before you could make any proposition to him you would have to consult with Mr. Freund who was then the district manager in the Kansas City territory?

A. No, not in that form. My recollection there, again, would be that at the time of the discussion I had told him that any move of that kind involving a change in Mr. Freund's status would naturally be discussed with him before it was made firm.

Q. In other words, you were contemplating replacing Mr. Freund with Mr. Sanger?

A. That is correct.

Q. Did you talk to Mr. Freund during the month of January, 1946?

(Testimony of Robert W. Kerr.)

A. Yes. Mr. Freund came to Los Angeles and we discussed the situation with him.

Q. Did he come to Los Angeles at your request or voluntarily? A. He came voluntarily, yes.

Q. Do you know what led him to come to Los Angeles at that time?

A. Well, apparently he had heard of the discussions with Mr. Sanger and he felt that he wanted to get in on it. [116]

Q. In the course of your discussions with Mr. Sanger in January of 1946 did you mention to Mr. Sanger some market research study that had been or was being made for the company in regard to sales methods?

A. I assume that incidentally that was mentioned. There had been a research made and studies on our marketing program by an industrial engineering firm, and their recommendations confirmed the program that we had established of using only our direct sales organization and breaking the country up into these sales districts.

Q. That study had been made prior to your talk with Mr. Sanger? A. That is correct.

Q. You mentioned, Mr. Kerr, discussions concerning the possible assignment of Mr. Sanger to the Chicago territory. Did Mr. Sanger evince interest in the Chicago territory at that time?

A. Oh, yes.

Q. But did Mr. Sanger at that time express his willingness to take the Chicago territory on the basis on which you offered it to him?

(Testimony of Robert W. Kerr.)

A. No. No, he did not. He expressed interest in it, and it is my recollection that right after that was discussed was when he returned to Kansas City, with the understanding he wanted to think it over. We wanted to do the same thing, [117] and the agreement was we would get together later for further discussion.

Q. Then I take it that Mr. Sanger returned to Kansas City at the conclusion of your talks in January? A. That is correct; yes, sir.

Q. I show you, Mr. Kerr, a photostatic copy of Exhibit 29, which I believe counsel has, which is a letter dated January 27, 1946, addressed to you and signed "Lionel" on the letterhead of the Hotel Phillips in Kansas City. Do you recall receiving that letter from Mr. Sanger? A. Yes, I do.

Q. I show you a photostatic copy of Exhibit 30, which purports to be a carbon copy of a letter from you to Mr. Sanger dated January 31, 1946. Do you recall sending that letter to him?

A. Yes, I believe I did.

Q. I also show you, Mr. Kerr, a photostatic copy of Exhibit 31, which is a letter from Mr. Sanger to you on the letterhead of Hotel Continental in Kansas City, dated February 10, 1946, and I will ask you if you recall receiving that letter from him?

A. Yes. Yes, I recall that letter.

Q. I call your attention to the third from the last paragraph on the second page, in which Mr. Sanger says:

"My loyalty will not allow me to leave the [118]

(Testimony of Robert W. Kerr.)

other firms that I represent, at this time, to go with Plomb exclusively. I am going to give them representation at least until the first of the year."

That, I take it, was in accordance with the statements he had made to you during his January conference, is that correct?

A. That is correct, yes.

Q. Did you subsequently see Mr. Sanger in Kansas City in March of 1946?

A. Yes, I did.

Q. Was that the first time you saw him after your meetings in January here in Los Angeles?

A. Yes, it was.

Q. Where did you meet him in Kansas City, if you recall?

A. As I recall, I think it was at the Muelbach Hotel in Kansas City.

Q. Was there anyone else present but you and Mr. Sanger?

A. No, just the two of us. We had lunch there.

Q. Did you at that time discuss with Mr. Sanger his application for reinstatement? A. Yes.

Q. Will you state, please, what was said by you and by him on that occasion?

A. Well, the conversation, as I recall it, lasted for [119] at least an hour, possibly longer than that. And again, we discussed all of the phases that we had previously, and at the outset my recollection of that is rather clear. I believe that Mr. Sanger was ready to say that he was willing to give up his other lines and come with Plomb, but as the discus-

(Testimony of Robert W. Kerr.)

sions went along, why, he came back to his same position, that he just felt that he could not personally afford to. On one hand, he told me what he was making from some of his lines, and then he also said that he just felt that they had been loyal to him and he loyal to them, and he did not feel like he could give up the other lines. After a discussion of some time, as I have said, he finally said: Well, if he could not go back on the old basis that he had been previously—that he felt he was entitled to go back on the old basis—that if he could not go back on that basis, he had no alternative but to take the matter up with the Veterans Administration.

Q. And when you say “the old basis” did you understand him to mean by that his old manufacturers’ representative basis?

A. That is correct.

Q. And continuing to represent other lines?

A. Yes.

Q. Did you at that time in Kansas City, in March of 1946, tell Mr. Sanger that you were willing to have him come [120] back into the Kansas City territory on the full-time basis that you have mentioned before?

A. Yes. All of the discussion was always on the basis of full-time representation; that is correct.

Q. Was there any further discussion at that time of the Chicago territory?

A. I believe there was. I would not say definitely, but again, I think we covered pretty largely

(Testimony of Robert W. Kerr.)

the same territory we had gone over in Los Angeles.

Q. When did you next see Mr. Sanger, if you recall, Mr. Kerr?

A. I don't believe I saw Mr. Sanger again until after I had left Plomb Tool Company. I may have seen him in Chicago at the time of the A.S.I. Show in December of 1947, but I am not clear on that.

Q. Do you recall whether or not you saw Mr. Sanger and had a conversation with him in Atlantic City in December of 1946?

A. That is right. Yes, we did. Mr. Pendleton and I together had a conversation with him there.

Q. What was the occasion? How did it happen you were at Atlantic City?

A. Well, this was the second one of the A.S.I. meetings. I spoke earlier at the one immediately following the war in Chicago. This was the resumption of their show. [121]

Q. I don't recall whether you stated or not, but what does A.S.I. stand for?

A. That is the Automotive Service Industries.

Q. And you did see Mr. Sanger then in Atlantic City, New Jersey?

A. That is correct, yes.

Q. And that was in December of 1946?

A. Right.

Q. Did you have any discussion with him at that time regarding his possible reinstatement with the Plomb Tool Company?

A. Yes. He and Mr. Pendleton and I had a session together at that time.

(Testimony of Robert W. Kerr.)

Q. Can you state what was said at that meeting, Mr. Kerr?

A. Well, again, Mr. Pendleton and I took the same position—and I think we genuinely meant it—that we would have liked to have had Mr. Sanger back, that is, if he would come in on the full-time basis. And again, he made it clear that he did not feel that he could properly give up his other connections.

Q. Did you tell him at that time that he could still come even then, come back to the Kansas City territory on the full-time basis?

Mr. Kenny: I submit that it is somewhat leading. It would be objectionable. I think that the conversation of [122] what was actually said the witness can testify to, but the business of counsel——

Mr. Wall: I will withdraw the question.

Q. Was there anything else said between you at that meeting, Mr. Kerr?

A. My recollection of that meeting, Mr. Wall, was that the discussion was very general. At the time there was no specific territory discussed. The one thing that was discussed was the policy of requiring full-time representation.

Q. Now, Mr. Kerr, if I may go back just a little bit in your testimony, in the January, 1946, period when you said that you discussed with Mr. Sanger the commission rates that were then in effect, which I think you said were seven and one-half per cent, at that time in January of 1946 did this reduced

(Testimony of Robert W. Kerr.)

commission rate of seven and one-half per cent apply to all sales representatives then connected with the company? A. Yes, that is right.

Q. In January of 1946, Mr. Kerr, were all of the sales representatives of the company on an employee full-time basis such as you have described?

A. At that time all but one, Mr. Schrenker.

Q. Mr. Schrenker? A. That is correct.

Q. Was he still an independent contractor?

A. He was still an independent contractor. [123]

Q. Will you please state what the circumstances were which led you to leave him on the independent contractor basis?

A. Well, he had remained on that basis by agreement with my predecessor for various reasons. The principal one was, as I recall, that he had brought into his employ two other men who had taken over the representation on his other lines, and he had given us our assurance that he was devoting practically 100 per cent of his time to the Plomb line personally. In spite of that, why, I had been putting the pressure on him at that time to change over and, as a matter of fact, had told him that it would have to be done very shortly.

Q. Do you know how many other lines he represented at that time?

A. I think only two. He had two small tool lines related to what we have.

Mr. Wall: You may cross-examine.

(Testimony of Robert W. Kerr.)

Cross-Examination

By Mr. Kenny:

Q. Mr. Schrenker had two small tool lines that were related to what Plomb Tool had, was that correct?

A. That is my recollection; yes, sir.

Q. During all of the time that Mr. Sanger was with Plomb he did not have any tool lines that were related to the Plomb Tool, isn't that correct?

A. Well, I couldn't speak for all of his period of [124] service, Mr. Kenny. The period that I am familiar with I don't believe he had any other tool lines.

Q. You stated there were various reasons that Mr. Schrenker was not subject to a change in status. One of them was he had not gone to war, wasn't that right? He had been in this country and in the service of Plomb Tool all through the years 1943, '44, and '45, isn't that correct?

A. Well, I think the answer to that, Mr. Kenny, would be that he had served during the previous war. He had a son in this war and he was not——

The Court: It was just a question of whether he was in the service or not.

A. He was not in the service in the second war; that is correct.

Q. (By Mr. Kenny): You did not reduce his commission to seven and one-half per cent, did you?

A. Oh, yes. I am quite certain that was on the same basis as all the rest of them.

(Testimony of Robert W. Kerr.)

Q. At the same time status? A. Right.

Q. Do you remember having a conversation in August of 1946 with a Mr. B. H. Koenig, who is a man from the Veterans Administration?

A. Well, I had conversation with Mr. Koenig, yes. I don't recall the exact date. [125]

Mr. Kenny: This, for the record, is Plaintiff's Exhibit 35.

Q. I am going to read to you a report that was made of that conversation by Mr. Koenig and ask you if that is substantially correct, or what changes you would like to make in what Mr. Koenig's report of that conversation was. He said that:

"Called at the plant of the Plomb Tool Company, Los Angeles Office and had a conference with Mr. R. W. Kerr, vice-president of the company. He stated the position of the company to be that the veteran was not an employee and had no reemployment rights; that he was a manufacturers' agent working on his own and carrying five other lines; that his activities were free from their direction and control; that the territory that the veteran had had was roughly Kansas, Nebraska, Iowa, and Missouri."

And I interrupt at that point. Was that correct, that you told him it was Kansas, Nebraska, Iowa, and Missouri?

A. That is correct; that is the Kansas City territory.

(Testimony of Robert W. Kerr.)

Q. You do recall, do you not, that Mr. Sanger before he went to war also had Minnesota and South Dakota?

A. He had a part of them, Mr. Kenny, yes; and it was a relatively minor part as far as business volume was concerned. [126]

Q. Yes. To go on reading this report of Mr. Koenig's:

"Mr. Kerr stated that the veteran had made a personal contact at their plant in Los Angeles, and that they had offered to reemploy him on the conditions of their present policies and rules. When asked what these changes were they stated as follows:

"1. Men must work exclusively for Plomb Tool Company and handle no other line.

"2. Men must follow regular itineraries and make regular daily reports to them; that the commission rate had been cut from 12½% to 7½%, and that the veteran had refused this offer."

Would you say that was a correct report of the conversation?

A. Substantially correct. One thing on the commission rate is not entirely correct, because on the old basis there had been some items on a higher rate, but the average rate, as I recall, was 10 per cent across the board.

Q. Continuing:

"Brought up the Shrinker case."

(Testimony of Robert W. Kerr.)

The gentleman calls it "Shrinker" in this report. The S-h-r-i-n-k-e-r case.

"They stated that Shrinker was permitted to continue on the old basis at his request, but that at the end of his present contract, which will coincide with the end of this year, he will be required to comply with the present [127] policies and rules, or he will not be allowed to handle the line."

Is that correct?

A. I would say substantially correct. I don't recall whether it was said in that many words or the same words or not.

Q. And the final paragraph is:

"The reason primarily for the change in policy is to make the field representatives direct employees of the company and to intensify the selling campaign throughout the country by thus compelling more frequent and regular calls."

That is correct, isn't it?

A. That is correct.

Q. Mr. Koenig stated that Schrenker was to be permitted to continue carrying his other lines until the end of this year. That would be the end of 1946, is that correct?

A. He has been so notified; that is correct.

Q. Counsel for defendant has showed you Exhibit No. 31, and I will ask you if this language is not contained therein?

(Testimony of Robert W. Kerr.)

“My loyalty will not allow me to leave the other firms that I represent, at this time, to go with Plomb exclusively. I am going to give them representation at least until the first of the year.”

And that would be up to the end of 1946, wouldn't it?

A. Yes. [128]

Q. I will read you the rest of the letter.

“I realize that this letter was to be a proposition on my part to sell you, so that I could again work for Plomb, so it appears that I will just have to stand on my record with the Plomb Tool Company. I am enclosing a compilation of commissions paid to me during the years I worked for the company and I believe that they do speak for themselves. The first figure 82 cents covers commissions paid to me for the months of July through December, 1932. I wish to recall to your attention that I opened every account in the territory with the exception of Osiek at St. Charles, Mo., which I am sure will prove to be just another small account, now that the war is over.”

Would you say that was correct, Mr. Sanger's statement that he opened every account in the Kansas City territory?

A. I would say substantially correct. Not all of them, Mr. Kenny, but a majority of them, yes.

The Court: Do you understand from that letter

(Testimony of Robert W. Kerr.)

that Mr. Sanger was proposing to you that he would give up the other lines at the end of 1946?

The Witness: That is correct, but then later he said he was not willing to do that.

Q. (By Mr. Kenny): Not willing to give them up at the end of the year? [129]

A. That was at the time that he met with Mr. Pendleton and me at the end of the year, December.

Q. Where did that meeting take place?

A. Atlantic City.

Q. I know, but whereabouts?

A. At the Claridge Hotel.

Q. What room? A. In the lounge.

Q. In the bar, I take it? A. Right.

Q. Yes. You had some drinks together?

A. That is right.

Q. That was after Mr. Sanger had gone to selective service and after Mr. Koenig had been to see you? A. That is right.

The Court: Had you ever told Mr. Sanger that the position of the company was that he was not an employee and had no reemployment rights as a veteran?

The Witness: I believe so, your Honor. That has been discussed with our personnel director at the time the matter first came up, because it was something that was dropped into my hands without previous connection, and the advice that I received then was that he had not been an employee, therefore, was not entitled to those rights.

Q. (By Mr. Kenny): Now, this Chicago terri-

(Testimony of Robert W. Kerr.)

tory that you [130] and Mr. Sanger had discussions with, that was a real weak spot in the Plomb group, wasn't it?

A. In relation to the potential of the territory it was. And we had a fairly substantial amount of business there, but not what I thought we should have had.

Q. Didn't you tell Mr. Sanger that if he went up there he could make a name for himself?

A. I don't think I told him "make a name for himself." I think I told him he could make himself a lot of money.

Q. Didn't you say that he could enhance his reputation as a salesman by going up there into the Chicago territory?

A. Oh, I don't recall making any such statement as that. I already had a great deal of regard for him as a salesman.

Q. In your discussion about the Chicago territory in which you said that he could continue to carry his other lines did you have any discussion of how he was going to be able to carry his other lines which were down in the Kansas City territory and engage in this venture for Plomb up in the Chicago territory?

A. Well, yes.

Q. Did you have any discussion about that?

A. Yes, we had discussions of that and Mr. Sanger pointed out that he had—he planned to add additional men to his crew. He referred to men who had worked for him before [131] he went into the service. As I recall, one or two of them had gone

(Testimony of Robert W. Kerr.)

into the service about the same time or subsequently. He expected to rehire them, and there was considerable discussion as to how it would be covered. My understanding was that he felt he could use those other men to cover the Kansas City territory on his other lines.

Q. He did not accept your offer to go to Chicago, did he? A. No, he did not.

Q. And one of the reasons he did not accept it was, was it not, that it presented, if not an impossibility, at least unfeasibility of continuing his other lines in his old territory and working on your lines in the Chicago territory; isn't that correct?

A. That was the final decision; that is right.

Q. I am going to ask you, Mr. Kerr, a general question about selling in this automotive field. Actually, a man who is selling tools and, say, water pumps and gears and brake lining or whatever other automotive parts, it is just as easy, is it not, for him to sell the tools along with the other lines that he presents to the various jobbers as he goes about the territory; isn't that correct?

A. You mean at the same time?

Q. Yes.

A. In my judgment, no. As a matter of fact, I believe [132] quite the contrary. From experience, I have found that it does not work out satisfactorily. A tool line, most of them, because it happens to be more of a detail line with the average jobber than his other lines, does require more actual merchandising activity on the part of the manufac-

(Testimony of Robert W. Kerr.)

turer and his representatives. The whole industry trend has been that way.

Q. What about in your present company, what is your policy?

A. Our present company, we have both manufacturers' agents and direct representatives, but again——

Q. As a matter of fact you had Mr. Sanger handling some of your tools for a while?

A. That is correct.

Q. Along with his other lines?

A. But it has not proved satisfactory and we have replaced all but three of the manufacturers' representatives now with our own direct men.

Q. When a company is small, I think you testified, at least when the Plomb Company was small they used salesmen handling multiple lines, that is correct?

A. That is correct.

Q. And then during the war Plomb had a terrific growth; isn't that correct, too?

A. That is correct. [133]

Q. By "terrific" can you just tell us what Plomb sold? I think in one year 14,000,000 in tools, isn't that correct?

A. That is right; in excess of 14,000,000.

Q. As against what in the years before the war?

A. Approximately a million.

Q. From a million to 14,000,000?

A. That is correct.

Q. All right. I will not withdraw the word "terrific" then. And it was during that period of

(Testimony of Robert W. Kerr.)

growth during the war that this policy of change to direct selling was adopted by Plomb Tool Company, isn't that correct, with the exception of Mr. Schrenker?

A. Well, that policy was commenced, Mr. Kenny, prior to the war. It was not a war-born policy. It was one that was established before the war started. And as a matter of fact, to correct the one answer I made there, the \$14,000,000 year was not during the war; that was 1947.

Q. That was after the war?

A. That was after the war; that is correct.

Q. But that policy adopted in 1941 was never applied to Mr. Sanger while he was still working for the company before he went to war, was it?

A. Well, no, because that was put into effect in January of 1942, and Mr. Sanger had either already gone into [134] the service or had given notice that he was going to.

Q. I think the record will show that Mr. Sanger did not go into the service until the end of 1942, isn't that correct?

A. My recollection was—I am not certain of that, Mr. Kenny. I was not in the picture at that time.

Q. I realize. You were the salesmanager until '44, were you?

A. That is right.

The Court: November, 1942, is the stipulation, is it not?

Mr. Kenny: That is correct.

Q. You stated that when Mr. Sanger during

(Testimony of Robert W. Kerr.)

these discussions wanted extended time, an extension of time to get rid of his other lines if he was to work in the Kansas City territory, that Plomb was unwilling to give him any extended time, is that correct?

A. Beyond what would be normal, reasonable notice, as I said earlier, yes.

Q. Which would be what?

A. Usually 30 days.

Q. Yes. The Kansas City territory that you discussed giving him, what did that exclude from the territory that he had before he went to war?

A. Well, in geographical area it excluded a part of the Dakotas and Minnesota.

Q. In dollar volume or percentagewise in dollar [135] volume what would that exclude from his territory?

A. Well, at the time he went into the service, that area, that part of it was relatively small. I could not give you exact percentage without seeing the figures, but we subsequently put in much heavier coverage there and built that territory up.

Q. Didn't Mr. Sanger bring in the Iron Stores account up there in Minnesota?

A. He brought in one of them, as I recall, the Cave Supply Co.

Q. And that was the first of those Iron Stores accounts that you got, wasn't it?

A. That is correct.

Q. And didn't he bring in some of the Northern Pump business up there?

(Testimony of Robert W. Kerr.)

A. I don't know, Mr. Kenny. That was prior to my time.

Q. But you did have the Northern Pump as an account, and a big one, wasn't it?

A. No, I don't recall the Northern Pump.

Q. You do recall the Iron Stores, and that was a big account ultimately, wasn't it?

A. Well, there is a peculiar circumstance in connection with that one that makes me recall it.

Q. It was a big one?

A. It became a big one, yes. [136]

Q. And Minnesota and North Dakota were not offered to Mr. Sanger in this offer of the Kansas City territory?

A. No, they were not.

Q. Did you ever arrive at anything definite with Mr. Sanger as to under what terms and conditions he was to carry Mr. Freund and these other two gentlemen who had gotten on the company's payroll during the war?

A. No. As a matter of fact the understanding was that if he took over the Kansas City territory, Mr. Freund at least, the senior man in the territory, would be moved elsewhere.

Q. Now, Mr. Sanger got out here on the first of January, didn't he, in your first conversations?

A. I am not sure, Mr. Kenny. I think he came earlier than that, as I recall. I think he came sometime in December for the holidays.

Q. You told him at the conclusion of the discussions that you had personally with him that you were sending for Mr. Freund and that you would

(Testimony of Robert W. Kerr.)

let him know the results of your discussions with Mr. Freund, and for him to call you about every day to find out what the results were; do you remember that?

A. No, no. As a matter of fact I never told him I was sending for Mr. Freund, because I didn't. Mr. Freund's arrival was a surprise to me at the time. [137]

Q. Did you ever tell him that you would tell him the results of your conversations with Mr. Freund? A. I may have.

Q. Did you ever invite him to come down and talk it over with Mr. Freund?

A. Not to my recollection, Mr. Kenny. We were talking some about it almost every day on the telephone or else——

Q. By "we"—— A. Mr. Sanger and I.

Q. Wasn't there about a two weeks' period when you did not see Mr. Sanger personally but merely talked to him over the phone or heard that he was inquiring for you over the phone?

A. No, I don't think there was any two weeks' period. There may have been a matter of a few days in there, but, as I recall, he was only there between two and three weeks altogether.

Q. But how many days during those two or three weeks was he out at the Plomb plant that you saw him on?

A. Several times. I don't know the exact number.

Q. Well, would you say two times, twice?

(Testimony of Robert W. Kerr.)

A. No, I would say more than that. I would say probably a half a dozen times anyway.

Q. Did he have six different interviews with you, six times with you? [138]

A. I would say at least that.

Q. And after Mr. Freund came out, did he have any personal interviews with you or any personal interviews with Mr. Pendleton at which you were present?

Mr. Wall: After Mr. Freund left?

Mr. Kenny: No, after Mr. Freund came out. I am trying to find out what happened after Mr. Freund came out here. Then did you do any talking in Los Angeles with Mr. Sanger?

A. Oh, yes. Yes.

Q. Were those personal conversations or were they over the telephone?

A. I think both, Mr. Kenny. I am not certain.

Q. Can you fix in your mind and tell the court any specific conversation you had with Mr. Sanger after Mr. Freund arrived out here?

A. Well, I don't recall specific conversations. As I have said earlier, we were talking. Mr. Sanger was in and out of Los Angeles. He was making trips around the area, and when he was in town he would call me and we would discuss the same matter again as we had been going around on it.

Q. Didn't you tell him that you were awaiting a decision from Mr. Pendleton during all that time?

A. No, because Mr. Pendleton was in on the discussions as we went along.

(Testimony of Robert W. Kerr.)

Q. Exhibit 29, which you have already been shown, Mr. [139] Sanger wrote to you on the 27th of January after he got back to Kansas City, and he said:

“Haven’t had time to think of any propositions to make to you, but am looking forward to hearing from you, so that I can again represent the Plomb Tool Company. Haven’t had time to think of any propositions to make to you.”

Does that refresh your recollection as to under what circumstances you and Mr. Sanger broke off your discussions in Los Angeles before he went to Kansas City?

A. Yes, that part of it I recall fairly well, because Mr. Sanger stated then that he did not feel that he was ready to agree to either of the propositions that had been made previously, but that he would like some time to think it over and subsequently might come back to me with a proposition. That was the way it was left.

The Court: We will take the morning recess at this time, five minutes.

(Short recess.)

Mr. Kenny: I have no further questions.

The Court: Mr. Kerr, at the time you made these offers to Mr. Sanger here in Los Angeles in the early part of 1946, at that time had you said anything to him about the attitude of the company with respect to his rights as a veteran, as to whether

(Testimony of Robert W. Kerr.)

he had any rights under the Act to be [140] reemployed?

The Witness: Yes. I believe, your Honor, that that was discussed at that first meeting in December in Chicago, when I told him at that time that the position of the company would have to be that.

The Court: In other words, to get to the point of it—and counsel may object, if they desire, to the form of this question—what I am trying to get at is this: These offers you made him, were they offers of reemployment under the Selective Service Act or were they just business deals you expected to make, standing on the position, the company's position, that Sanger had no rights under the Act?

The Witness: The position we took, your Honor, was that we did not believe that he had any rights under the GI Bill. However, we had a great deal of regard and respect for him, and had we been able to work out some arrangement, would have been glad to have him back in the organization.

The Court: In other words, you made him these offers because you wanted him back, not because you thought he had any legal right to be employed, is that correct?

The Witness: That is correct.

The Court: Did you so state to him in substance and effect?

The Witness: That is correct.

The Court: The stipulation filed here states that the geographical limits of the territory in which Mr. Sanger [141] formerly worked have been re-

(Testimony of Robert W. Kerr.)

duced from time to time until it now comprises the States of Kansas and Missouri, and that portion of Nebraska east of the extension of the Colorado eastern border, certain counties in Illinois, and all of the Iowa except certain counties therein. Are you familiar with that territory?

The Witness: Yes. Yes, I am.

The Court: Would you say that was a territory comparable to the territory that Mr. Sanger worked prior to the war?

The Witness: From the standpoint of the distribution that had been developed, yes. As I said earlier, your Honor, the Minnesota and Dakota territories had been relatively unexplored areas so far as Plomb was concerned up to the time of the war.

The Court: Was that the territory you offered him in January of 1946?

The Witness: In January, '46, it was the then existing Kansas City territory, which is approximately what that stipulation says, although at that time I do not believe those Illinois counties were in it.

The Court: Were portions of Iowa in it?

The Witness: At that time it included all of Iowa, all of Nebraska except that small tip up in the northwest section, and all of Missouri and Kansas.

The Court: Any redirect? [142]

Mr. Kenny: Just on that.

Q. But that Kansas territory that was the subject of your discussions had tied to it the condition

(Testimony of Robert W. Kerr.)

that he take along with him Mr. Freund and the other two men who had been accumulated on the payroll? A. Not Mr. Freund.

Q. Not Mr. Freund, but at least take on three men? A. That is correct.

Q. And he was to take them on, and the commission was now $7\frac{1}{2}$ per cent?

A. That is correct.

Q. As against 10 or $12\frac{1}{2}$?

A. That is correct.

Q. I think the contract was $12\frac{1}{2}$ mostly at the time Mr. Sanger had it?

A. At his time it may have been.

Q. So he was to get slightly reduced territory, that is, with Minnesota and South Dakota cut off, and he was to get three men added to him and less commission; that was the offer, is that correct?

A. Well, a lesser rate of commission.

Q. Yes, the volume may have taken care of it?

A. The thing that was explained to him at the time was that the company's production and merchandising program made that even much more lucrative than the arrangement pre-war. [143]

The Court: Did you discuss with him who was to pay these men?

The Witness: Well, in explaining the new program I undoubtedly explained how it was worked, which was done in all territories, your Honor, and that was, the earnings were pooled, then a division was made according to agreement between the district manager and the men and the company.

(Testimony of Robert W. Kerr.)

The Court: In other words, the territory yielded certain business.

The Witness: That is correct.

The Court: And certain commissions followed from that business?

The Witness: That is correct.

The Court: And that would be divided as gross earnings among the men who worked the territory, is that it?

The Witness: That is correct.

Q. (By Mr. Kenny): Do you recall Mr. Sanger having written to you in May of 1945 and you replying to him on July 20, 1945? I show you Exhibit 28. A. Yes, I recall that letter now.

Mr. Wall: Which exhibit is that, Mr. Kenny?

Mr. Kenny: Exhibit 28. It was item 61.

Q. Mr. Sanger wrote May 15th; that was about six months before he got out of the service, isn't that correct? A. That is right. [144]

Q. So when you wrote him you did not tell him that you were standing on the position that the GI Bill of Rights or the Selective Service Act did not apply to him; you did not write him that, did you?

A. No. I had no occasion to, Mr. Kenny.

Q. What you did, you told him you were going to have difficulty hiring because of the changed plan, isn't that right?

A. That is what it says there; yes.

Q. And that was your original position, that you

(Testimony of Robert W. Kerr.)

had difficulties; you had changed your methods while he was at war, isn't that correct?

A. That is correct.

Mr. Kenny: That is all.

The Court: Mr. Kerr, did you talk with Mr. Sanger about how the earnings of this territory would be divided between him and the other men?

The Witness: Well, again, we went into the details of the territory at considerable length, and I am certain that that was one of the matters that was discussed, because it was quite important to him at the time.

The Court: Was there a fixed policy as to division—the chief man or head men or district manager would get so much?

The Witness: Again, that depended on the production [145] from the territory and the number of men involved. In other words, where there were two men, the usual arrangement was a 60-40 basis; where there were three men it was usually 40-30 and 30; and then where there were more men it would be scaled down still further.

The Court: Do you recall what arrangements——

The Witness: My recollection of that territory was 40-30 and 30.

The Court: Is that your recollection of what you told Mr. Sanger?

The Witness: That is correct.

The Court: Do you have redirect?

Mr. Wall: Yes, if I may, your Honor.

(Testimony of Robert W. Kerr.)

Redirect Examination

By Mr. Wall:

Q. Mr. Kerr, as I understood you on your direct examination, you said that in 1946 the Kansas City territory was served by Mr. Freund and two additional men? A. That is correct.

Q. In Mr. Kenny's questions I was not sure whether he was talking about a three-man total or Freund plus two. Am I correct that you said that that territory then had Freund plus two men?

A. That is right.

Q. And, as I understood your direct testimony, you said [146] that your condition with respect to manpower attached to your offer to Mr. Sanger was that he put equal manpower to that which Freund had, was it; or was it not a condition of that offer that he take these two men whom Freund then had, or was Mr. Sanger to be entitled to have some voice in choosing his own assistants?

A. As I recall, that was left open. That was the one point on which I was firm, was that he would have to have the same manpower coverage as then existed, at least that.

Q. Now, you gave some testimony with reference to accounts opened in this territory by Mr. Sanger. After Mr. Sanger went into the service were there any new accounts in his former territory which were opened by Mr. Freund or other people who were assigned to that territory after Mr. Sanger left?

(Testimony of Robert W. Kerr.)

A. Well, as I recall, there were other accounts. There were some that had been dormant with him that were revived and made very active, and without having the list of accounts in front of me I would not say specifically what other ones were added, but with the increase in the activity of the territory, I am quite certain there were other accounts added.

The Court: When the volume increased from one to fourteen million, Kansas City territory contributed its share, did it?

The Witness: In fact more than its proportionate share; that is correct. [147]

Q. (By Mr. Wall): Do you happen to recall, Mr. Kerr, how much of an increase there was in that business in that territory from, say, 1942 to 1946? I recognize that you have been away from the company a while. I don't know whether you would recall it.

A. My recollection, offhand, was that it ran from eight to ten times greater than it had before. Of course, the \$14,000,000 figure is a little misleading, Mr. Wall, in that in the period intervening Plomb Tool Company had acquired four subsidiary companies and the volume that went in Plomb tools through these wholesalers was only a part of that total of 14,000,000. One company made tools, for example, for the syndicates like Sears Roebuck and those companies; another one was making tools for Government agencies. And again there was the additions of the plier and ad-

(Testimony of Robert W. Kerr.)

justable pipe wrench plant in New York State which added to the total volume.

Q. Are the subsidiaries P & C Hand Forged Tool Co. and——

A. P & C Hand Forged Tool Co., Penens Corporation, and the J. P. Danielson Company, New York.

Q. The J. P. Danielson Company, I believe, was eventually made a part of or merged into the Plomb Tool Company, wasn't it?

A. That is right. [148]

Q. Did your offer to Mr. Sanger in 1946 contemplate that he would be entitled to represent the lines of these subsidiary companies?

A. At that time we had in connection with the new program, the expanded activity, we had given the Plomb men sale of the P & C line. Of course, they had added to their business the Danielson products, which became a part of both the Plomb and P & C lines. The Penens line was not included at that time.

Q. Did your offer to Mr. Sanger include representation of the P & C line?

A. Yes, that is correct.

Mr. Wall: That is all.

Recross-Examination

By Mr. Kenny:

Q. The P & C line. Who made the line of products called "Challenger"?

(Testimony of Robert W. Kerr.)

A. Challenger was made by Penens Corporation.

Q. Penens? A. That is correct.

Q. And before the war Mr. Sanger was selling Challenger products, wasn't he?

A. Oh, no. We didn't have—well, we made for a short while, I think it was in 1939, a few tools in the Plomb line which were called "Challenger tools," but what is [149] presently known as the Challenger line was not developed until the summer of 1946 and is made by the Penens Corporation which is a subsidiary.

Q. And the J. P. Danielson merger did not occur until very late in 1946 or 1947; they did not come into the picture until after you got through dealing with Mr. Sanger, did they?

A. That is correct.

Mr. Kenny: That is all.

Mr. Wall: No further questions.

The Court: You may step down, Mr. Kerr.
Your next witness.

Mr. Wall: I will call Mr. Pendleton.

MORRIS B. PENDLETON

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Morris B. Pendleton.

Direct Examination

By Mr. Wall:

Q. You are the president of Plomb Tool Company, are you, Mr. Pendleton?

A. Yes, sir.

Q. How long have you held that office?

A. Since October of 1936.

Q. Were you connected with the company prior to that [150] time?

A. Yes. I was vice-president from 1928 until I became president.

Q. Are you familiar, Mr. Pendleton, with the status of the sales representatives of the company in the period of 1941 and prior thereto?

A. Yes, sir.

Q. Will you state what the company's policy was with respect to sales representation during that period?

Mr. Kenny: Can I have the date?

Mr. Wall: 1941 and prior thereto.

Mr. Kenny: That would be January 1st, 1941?

Mr. Wall: I am speaking of the period prior to January 1st, 1942, during 1941 and prior thereto.

A. During 1941 and prior thereto the sales of the company, Plomb Tool Company, was generally

(Testimony of Morris B. Pendleton.)

handled by manufacturers' representatives or known as manufacturers' agents.

Q. Did all of those manufacturers' representatives handle other lines in addition to the Plomb line?

A. Some handled other lines made by other companies; some represented the Plomb Tool Company exclusively.

Q. Did you have so-called missionary men doing the work in connection with your sales activities at that time?

A. Yes. In 1941 and prior we had certain missionary men who were employees of the Plomb Tool Company and who [151] worked in various parts of the country under the joint direction of the company and the representative of the company in the specific territory.

Q. What type of activities did they engage in?

A. As the term "missionary men" implies in the trade, their job was pretty much in the matter of arranging stocks or making display boards clean and neat and orderly, in the distribution of catalogs, and frequently in calling on garages to solicit business on behalf of jobber customers that we might have had on our books or were at that time soliciting.

Q. Did those missionary men solicit direct orders for Plomb Tool Company?

A. They might go into a jobber's, in the absence of a territorial representative—manufacturers' agent in those days—and actually receive an order

(Testimony of Morris B. Pendleton.)

written by the jobber and forward it to the company, because the commissions were paid on a territorial basis and not on the basis of orders as written or on the basis of who might have picked up the order.

Q. There was reference yesterday in Mr. Sanger's testimony to a Mr. Nate Needham, whom I believe he said was assigned to his territory. Can you state what capacity Mr. Needham held with the company?

A. Mr. Needham was originally a peddler, meaning a person who bought tools from us and resold to garages. And then he was in that capacity about the time Mr. Sanger came [152] into the territory, and then later became a missionary man, giving up his former business, and as a missionary man became an employee of the company. He was finally terminated in 1938, I believe, possibly 1939.

Q. When you say he was terminated you mean he left the company's employ?

A. He terminated in the employ of the company.

Q. I believe the evidence showed yesterday, Mr. Pendleton, that Mr. Sanger made his first connection with the Plomb Tool Company in 1932 as a manufacturers' representative; and I believe Mr. Sanger testified that a Mr. Moore helped him at that time to arrange for other lines to handle. Who was Mr. Moore?

A. Mr. Moore, in 1932, was the then salesman-

(Testimony of Morris B. Pendleton.)

ager of the Plomb Tool Company and, as the testimony indicated yesterday, worked out an arrangement with Mr. Sanger in collaboration with other manufacturers, and Mr. Sanger went into the so-called Kansas City territory with a number of lines, of which Wohlerdt was mentioned here, and Plomb Tool Company lines, and functioned for the various manufacturers as a manufacturers' agent in that area.

Q. Is that a typical situation for Mr. Moore to help Mr. Sanger to get other lines to represent?

A. When companies are small and their customers are limited and their sales volume is small, it is very common in [153] the tool business of various sorts for sales to come through manufacturers' agents; and, as a matter of neighborliness, if several companies have a territory in which they want representation, for them to jointly use the same person to represent them.

Q. During this period prior to January of 1942, when you have testified that the sales representatives were all manufacturers' representatives rather than employees of the company, did the fact that by treating them as independent contractors rather than employees would eliminate the necessity for making social security payments with respect to those men have any bearing upon the policy of the company in so treating them?

Mr. Kenny: Well, I submit that is calling for a conclusion of the witness as to whether the social

(Testimony of Morris B. Pendleton.)

security law in 1936 would have any effect on the policy. I object to it on that ground.

The Court: The question, as I understand it, is whether the change was prompted by a desire to avoid the necessary impact of the law, the Social Security Act.

Mr. Wall: A statement was made——

Mr. Kenny: I think it is a practical question, anyway. I will withdraw the objection.

The Court: Is that your intent, to ask whether the change was prompted—— [154]

Mr. Wall: I was not asking about a change, your Honor. The implication of Mr. Sanger's testimony yesterday was that the reason he and other men were on an independent contractor form of contract prior to his going into the army was because of social security savings involved.

The Court: Yes, I have in mind that corollary issue that has been injected here. But your question is, precisely, whether the change in the contract was prompted by a desire to avoid the impact of the Social Security Act?

Mr. Wall: It is not directed at the change in the contract, your Honor. I am asking as to whether the policy of treating them as independent contractors prior to 1942 was the result of the desire to save social security taxes.

The Court: Very well, he may answer.

Q. No. The economy in the matter of social security taxes, both Federal and State, was an im-

(Testimony of Morris B. Pendleton.)

material consideration in this matter. The desire to change from an independent contractual basis to full employees was motivated by the need on the part of the company to have full-time employees under its direction and control, so that we could get the maximum sales volume out of the several territories.

The Court: Prior to 1939 was this plaintiff here, Mr. Sanger, an employee of the company?

The Witness: Prior to 1939?

The Court: Yes. [155]

The Witness: Mr. Sanger, prior to 1939, Mr. Sanger was a manufacturers' agent.

The Court: Had he been prior to the time he went into the service at any time an employee of the company?

The Witness: No. In our opinion Mr. Sanger was never an employee of the company at any time, and served as manufacturers' representative and manufacturers' agent at all times.

The Court: There was no change in the arrangement, so far as you know, from the time he first came into the company until he went into the service?

The Witness: No. Our relationship with him has been consistently throughout the years the relationship of manufacturer with that of an independent contractor or a manufacturers' agent.

The Court: Yes, I understand. I direct the question: Had there been any change? And I understand the answer is "No."

(Testimony of Morris B. Pendleton.)

Q. (By Mr. Wall): I show you, Mr. Pendleton, Plaintiff's Exhibit 7, which is a memorandum of agreement between the Plomb Tool Company, "called the Company, and L. H. Sanger, called the Salesman," which I believe Mr. Sanger testified he executed to cover the year 1938. I also show you Plaintiff's Exhibit 8, which is a Memorandum of Agreement dated January 31, 1939, in which Mr. Sanger is referred to [156] as the Representative to sell its products "as an independent contractor" and I ask you whether or not the change in the form of the contract from 1938 to 1939 as between those two exhibits was in any way influenced by a desire on the part of the company to avoid the payment of social security taxes?

A. No, sir. The use of "salesman" in one case and "representative" in the other case is purely a choice of words, and did not in any way alter the relationship between the company and Mr. Sanger.

The Court: Do you know why the change was made?

The Witness: No, I do not. In one case, one person, Mr. Moore, drafted it, and I think in the other case, Mr. Stevens. I am not sure. It was purely a choice of synonyms for the same relationship, that of a manufacturers' agent.

Q. (By Mr. Wall): Now, Mr. Pendleton, there has been reference here to the fact that after the war or by 1946 the company policy had changed and it had gone over to employing salesmen as

(Testimony of Morris B. Pendleton.)

employees on a full-time basis. Are you familiar with that change in policy? A. Yes, sir.

Mr. Kenny: I hate to accuse counsel of misstating evidence, but this witness has testified that the change of policy occurred on January 1st, 1942, or prior thereto, and not 1946.

Mr. Wall: That is right. I understand that. My statement [157] was, Mr. Kenny, that by 1946 that change had been made.

The Court: Do you wish to restate your question?

The Witness: Please.

Mr. Wall: I will restate the question.

Q. When did the company change its policy, Mr. Pendleton, and determine to handle its selling activities through employee-salesmen employed on a full-time basis?

A. The decisions were reached to change from an independent contractual relationship to an employee relationship in the fall of 1941, as between Mr. Stevens, vice-president in charge of sales, and myself, to be effective on January 1, 1942.

Q. Will you please state the circumstances which led up to that change in policy?

A. The circumstances leading to that change in policy was the result of the normal evolution and growth of our company, the increase in the number of its employees, the increase in the variety of tools that we were manufacturing, the increase in the number of industries that we were serving and the tools that we were making for them; and also

(Testimony of Morris B. Pendleton.)

because many customers had suggested that they could be far better served by full-time exclusive men than they could be served by manufacturers' agents with multiple lines. And further buttressing our judgment, we examined the affairs of a great many growth companies and found the determination was [158] generally consistent that those companies in their early days started with such commission representation on an agency basis as they could obtain, and then as they grew, they had other full-time men, either former agents discontinue other lines and work solely for the company in question, or the replacement of those agents by full-time employees.

Q. Had there been an increase in the company's business of any substantial character by the fall of 1941, when you say this decision was reached?

A. If I may refer to some notes that I made this morning? From our records—and this is the Plomb Company not including subsidiaries—in 1939 the sales volume was \$869,000; in 1940, \$1,154,000; and in 1941, \$2,414,000, or a three-fold increase from 1939 to and including 1941. But the significant fact there is that while we increased three times in sales volume, measured by dollars, our per cent to the Service Hand Tool Industry had increased from 3.5 per cent in 1939 to 5.4 per cent in 1941.

Q. Those figures that you have given, Mr. Pendleton, with respect to the dollar volume of the

(Testimony of Morris B. Pendleton.)

Plomb Tool Company's sales are derived from the company's books?

A. They are derived from the company's books, and the industry figures are derived from the Service Tool Institute which keeps figures on the hand tool industry.

Q. Did that increase in the company's business continue on until 1946, Mr. Pendleton? [159]

A. Yes, sir. In 1942 the Plomb Tool Company only, without subsidiaries, sold \$4,719,000; 1943, \$5,887,000; 1944, \$7,197,000; 1945, \$6,852,000; and in 1946, \$10,600,000. And the corollary to that, which is even more significant, is that while in 1941 our per cent to the industry was 5.4 per cent, by 1946, as the result of the full impact of our policies of full-time employees, it had risen to 11.7 per cent, or more than double the position that we had in the industry in 1941.

Q. Do those dollar figures you have given for those years, Mr. Pendleton, during the war include Government contract business?

A. This includes Government business sold to jobbers and direct to Government.

Q. Are those figures likewise, though, limited to the Plomb Tool Company alone?

A. These are limited to Plomb Tool Company only and are prior to the acquisition of the Danielson plant.

Q. When did you put into effect this policy with respect to having salesmen on a full-time employee basis which you say was determined in 1941?

(Testimony of Morris B. Pendleton.)

A. This policy was instituted in January, 1942.

Q. Was it made effective as to all salesmen at that time?

A. It was made effective to all salesmen that were [160] then independent contractors, excepting three. One was Neil Jones, whom we asked that he either come full time or he would be replaced, and he was terminated in May of 1944.

The Court: What territory did he have?

The Witness: He was working in the Carolinas, which was an exceedingly difficult territory to cover, and where sales were limited. He was terminated in May of 1944. The same pressure was put upon Mr. Schrenker and the understanding there was that—the compromise effected there was that he give us practically 100 per cent of his time, which he did, divesting himself of his attention to other lines so that he could give us the type of individual representation that we required.

The third exception was Mr. Sanger, who was continued in 1942 as a manufacturers' agent.

Q. (By Mr. Wall): Are you able to state, Mr. Pendleton, whether or not the jobbing business in the Kansas City territory increased in the period, say, subsequent to the war over the business in that territory prior to the war under Mr. Sanger?

A. The business in the so-called Kansas City territory, as developed by Mr. Sanger in 1941, produced approximately \$102,000 in sales volume, and in the year of 1946 the presently constituted Kansas City territory——

(Testimony of Morris B. Pendleton.)

Q. You mean presently constituted, or the territory [161] as constituted in 1946?

A. I beg your pardon. The territory as constituted in 1946 produced volume of \$737,000, or seven times the sales volume of 1941.

Q. And the figures for 1946 relate to the Kansas City territory as it then existed, which did not include Minnesota and portions of South Dakota?

A. That is correct.

Q. Which Mr. Sanger had?

A. That is correct.

Q. When you effected changes in your relationship, your contractual relationships with the sales representatives in 1942, with the exceptions you have mentioned of Mr. Sanger, Mr. Schrenker, and Jones, did you then commence to pay social security taxes with respect to the men who became employee-salesmen?

A. Yes, obviously, because we exerted strict control over the men, required of them itineraries, required many things of them, and they were fully and completely under our control; and obviously, in that respect, social security and unemployment insurance taxes followed as a natural consequence.

Q. Does Plomb Tool Company have a profit-sharing plan for its employees?

A. Yes, it does.

Q. Can you state in general what the nature of that plan [162] is?

A. The profit-sharing plan of Plomb Tool Company commenced in 1942 for those employees who

(Testimony of Morris B. Pendleton.)

were on our payroll as employees for the calendar year of 1942. The plan provides—the plan is evidenced by a trust indenture which is cleared, has been cleared through Internal Revenue, salary stabilization, wages and hours, California Corporation Commissioner, I think of at least, and the requirements of that plan are very strict and exacting. When the company makes a minimum profit, then the youngest employee would get one per cent for their first year of participation; for five years of participation would get two per cent. At the maximum rate of profit—not the maximum rate, but the minimum of maximum qualifying rate, the younger employees would begin with $7\frac{1}{2}$ per cent and the older employees will be credited 15 per cent of their compensation as employees for the year in question.

The Court: We will take the noon recess at this time.

Mr. Wall: Yes, your Honor.

The Court: Until 2:00 o'clock this afternoon.

Mr. Wall: Very well.

The Court: Very well, this trial is recessed, then, until 2:00 o'clock this afternoon.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day, Wednesday, December 20, 1950.) [163]

Wednesday, December 20, 1950, 2:00 o'Clock P.M.

(Other court proceedings.)

The Court: Are you ready to proceed in the case on trial?

Mr. Wall: Yes, sir. Mr. Pendleton, will you resume the stand, please?

MORRIS B. PENDLETON

Direct Examination

(Resumed)

By Mr. Wall:

Q. Just prior to the noon recess, Mr. Pendleton, I believe you were describing the profit-sharing plan that the company had in effect for its employees. I believe you said that that plan was put into effect first in the year 1942, is that correct?

A. Yes, sir.

Q. Was Mr. Sanger ever a participant?

A. No, sir.

Q. In the profit-sharing plan? A. No.

Q. This morning you gave some figures, Mr. Pendleton, regarding the gross sales of the defendant company for certain years, then a percentage of the industry for certain years, and also the gross sales volume of the Kansas City territory. I realized during the noon hour, and Mr. Kenny has also [164] called my attention to the fact, that we omitted the year 1942 from those figures, and while you are about it I wish you would direct yourself also to the years subsequent to 1946. Can you tell us the gross dollar sales volume of Plomb Tool Company for the year 1942?

(Testimony of Morris B. Pendleton.)

A. For the Plomb Tool Company not including subsidiaries for the calendar year of 1942 was \$4,-719,000, or 6.7 per cent of the industry.

Q. What are the same figures regarding Plomb Tool Company for 1947, 1948, and 1949?

A. 1947, \$9,750,000, 10.5 per cent of the industry; 1948, \$7,420,000, for a percentage of 9.3.

Mr. Wall: Just a moment, Mr. Pendleton. I had understood that Mr. Kenny wanted those figures. Maybe I am wrong.

Mr. Kenny: No, just the territory. Mr. Pendleton did not give us the territory figures for 1941 and 1946. We would like the territory figures for 1942 and 1949.

Q. (By Mr. Wall): Before you get to the territory figures, Mr. Pendleton, would you give the percentage of the industry figures for the Plomb Tool Company for the year 1942? We omitted that this morning.

A. The calendar year percentage of industry?

Q. Yes.

A. For the year 1942, the dollar figure was \$4,-719,000 and the per cent to the industry was 6.7 per cent. [165]

Q. Do you have the figures for the year 1942 on the Kansas City territory as then constituted, Mr. Sanger's territory at that time?

A. For 1942, the Kansas City territory as then constituted, had sales for the Plomb Tool Company of \$136,000.

Q. What were the territory figures for the Kan-

(Testimony of Morris B. Pendleton.)

sas City territory as constituted from time to time for 1947, 1948, and 1949?

A. For 1947, the Kansas City territory as then constituted for the Plomb Tool Company, was \$529,640; for 1948, \$623,000; 1949, \$295,500.

Mr. Wall: Are those the figures you wanted, Mr. Kenny?

Mr. Kenny: Yes. If there are any figures for 1950 available?

Mr. Wall: I do not know.

Q. Do you have figures for '50 on the territory?

A. No, sir.

Q. Mr. Pendleton, there has been testimony here to the effect that Mr. Sanger was awarded a service pin by the company for seven years' service, another for 10 years' service, I believe. Will you state what the policy of the company has been with respect to the award of service pins?

A. Service pins consist of a small metal badge about a quarter of an inch by three-eighths of an inch, of which I have a sample here, which reads: "Plomb Tool Co." and the [166] number of years services.

Q. And those are given in different metals for different years of service, I believe?

A. Those are given in brass for two, three, and four years; in silver for five to nine years, inclusive; and gold badges for 10 years and thereafter.

Q. What has been the policy of the company as to the persons to whom such pins were awarded?

(Testimony of Morris B. Pendleton.)

A. Those badges are given to persons irrespective of status, but on the basis of connection of service. They were given to manufacturers' agents, to employees, even to the directors of the company who were not employees.

Mr. Wall: Does your Honor care to see the pin? I do not think it is necessary to introduce it in evidence.

The Court: I have a general idea of it from the description and I visually see the physical aspects of it.

Mr. Wall: Thank you.

Q. You testified this morning, Mr. Pendleton, that prior to 1942 the company did employ certain missionary men to operate in the territories. Do you have any missionary men so employed at the present time?

A. No, we do not, for the reason that we have more manpower in the respective territories and those employees are expected to do their own missionary work and are doing so effectively, and which is a far better arrangement and more [167] effective than to have a missionary man supporting a territorial salesman of the type of a manufacturers' representative or agent.

Q. Now I would like to direct your attention to the month of January of 1946. Did you know at that time that Mr. Sanger applied to the company for reinstatement in his pre-war position?

A. Yes. He was here at the Los Angeles headquarters and, as is his custom, he has the run of the

(Testimony of Morris B. Pendleton.)

place and visits around with different people. We have known him since 1932 and he was with us for 11 years and built up various associations, and he was in and out of the different offices and I chatted with him.

Q. Did you have any conversation with Mr. Sanger in January of 1946 regarding his application for reinstatement?

A. Yes. I sat with Mr. Sanger and Mr. Kerr and listened to Mr. Kerr state the basis on which he offered Mr. Sanger a position with the company, and the offer seemed to be entirely reasonable and consistent with the way in which the company was operating at that time.

Q. Did you have any conversations with Mr. Sanger during that month of January at which Mr. Kerr was not present, regarding this subject?

A. No, only pleasantries, for the reason that we are well departmentalized in our company and certain officers [168] are responsible for different fields of activity, and Mr. Kerr's responsibility was very clearly that of sales, and since he had stated the basis on which he had offered Sanger another position, there would be no purpose in my discussing that privately with Mr. Sanger, because the basis on which it was so stated seemed to be adequate and clear and entirely satisfactory.

Q. When did you next see Mr. Sanger after the month of January, 1946?

A. I do not recall having seen Mr. Sanger from

(Testimony of Morris B. Pendleton.)

his January trip until he stopped in our booth at the A.S.I. show at Atlantic City in December.

Q. Was that December of 1946?

A. That was December of 1946.

Q. When you say "our booth," you mean at the Plomb Company?

A. At the Plomb Tool Company booth, and asked for an opportunity for conversation.

Q. What did you say when he asked for that opportunity?

A. My response was that I am always willing to talk with anybody at any time about company affairs, and that if he would meet Mr. Kerr and myself at the bar in the Claridge Hotel, we would be glad to visit with him.

Q. Did you and Mr. Kerr subsequently meet him in the [169] bar of the Claridge Hotel?

A. Yes, we did.

Q. That same day?

A. That same evening.

Q. Was there a discussion at that time of Mr. Sanger's desire to represent the Plomb Tool Company?

A. Yes. The position that I took was that an offer had been made in clear and unmistakable terms in January; and that I had understood from Mr. Kerr that it had been repeated on other occasions when I was not present; and my position at that time was that it was still open should he wish to accept even the Kansas City or the Chicago territory, as has been described here earlier in these

(Testimony of Morris B. Pendleton.)

hearings.

Q. Did Mr. Sanger make any response to that statement?

A. My memory was that he was still disinclined to accept either offer.

Mr. Wall: No further questions.

Cross-Examination

By Mr. Kenny:

Q. Mr. Pendleton, when did Mr. Sanger stop being a district manager for Plomb Tool?

A. At the end of 1942 upon entry into the service.

Q. And up until that time he was your district manager in Kansas City, is that correct?

A. We did not term him by that title "district manager." [170] That has been generally used in this court hearing. I did not refer to him as that, in that manner.

Q. You have never referred to him as "district manager"?

A. In our inter-company terminology he was the manufacturers' representative and a territory representative in my dealings with Mr. Sanger, in my correspondence with him.

Q. You never referred to him as an employee?

A. When he called upon us to make our best pitch in his behalf toward a Naval Officer enlistment, why we dressed our communications up in whatever language might be most impressive to the

(Testimony of Morris B. Pendleton.)

Naval Department and solely in Mr. Sanger's behalf.

Q. What you want to say is that you told your Government that he was your district manager, is that correct, Mr. Pendleton? You told your Government he was your district manager, didn't you?

A. Yes, sir.

Q. And that was not true, is that it?

A. Let me repeat what I said before, which you apparently did not understand, and that is, the nomenclature in the company in our internal operations is not necessarily consistent with a letter of recommendation, when you naturally go overboard in behalf of a man who asks you specifically to go overboard for him.

Q. Is this letter, which is Exhibit No. 22, the truth [171] or is it you going overboard in representing Mr. Sanger to your Government? And I call your attention to this language, Mr. Pendleton.

“In the many years he has been district manager for Plomb Tool Company, he has assisted in the designing of many special tools for various branches of Government and manufacturers serving these branches.”

Is that the truth or not?

A. Yes, it is the truth, and the fact that we use that language internally, in my opinion, is immaterial.

Q. It is the truth, then, that he was your district manager?

(Testimony of Morris B. Pendleton.)

A. He was our manufacturers' agent in that area and referred to in that letter as a district manager.

Q. But is that what you told the Government or is that the truth?

A. Well, the fact that we do not refer to him as the district manager internally does not alter the fact that he may be referred to in that instance in that manner.

Q. Is it the truth that he assisted you in designing special tools for various branches of the Government and manufacturers serving these branches?

A. All persons connected with the company in any capacity, whenever they came across an idea that would be useful in the way of a new tool or procedure or anything else, [172] irrespective of their status with the company, always were expected to turn in those ideas for the good of the company.

Q. Just what did Mr. Sanger do in that regard that supports this statement you made to the Government?

A. Mr. Sanger in his capacity as a manufacturers' agent representing us would give us the benefit of such ideas as would come to him from time to time, and entirely in line with duty, just the same as anybody else connected with the company would do the same thing.

Q. In the year 1946, you stated that Mr. Sanger's old territory yielded \$737,000. That was the highest yield that territory ever gave, wasn't it, 1946?

(Testimony of Morris B. Pendleton.)

A. I stated that \$737,000 was the volume of business in 1946 in the Kansas City territory as then constituted.

Q. And that was the highest you ever had in that territory, isn't that correct, 1946?

A. Yes, sir.

Q. 1946 was the year when you were selling tools to the Government GI schools that were being opened up, schools of training for veterans, wasn't that right? A. To some extent.

Q. Was not that, if not your biggest volume, your biggest new source of volume that occurred in that year, the selling of tools to the GI schools?

A. It was a new volume, but a relatively minor volume. [173]

Q. And didn't the rest of the volume of 1946 come from jobbers who were replenishing their stocks that had been depleted during the three preceding war years? A. To some extent.

Q. Doesn't that account—those two factors, among others—account for the fact that while your income in that territory was \$737,000 in 1946, it was only \$295,000 last year?

A. Yes, and for very specific reasons.

Q. And isn't it a fact that your revenue of your income from that area in 1950 is even going to be less than 1949?

A. No. 1950 will be materially higher than 1949.

Q. Relative to the policy on service pins, service buttons, was this—

(Testimony of Morris B. Pendleton.)

The Court: Are you referring to an Exhibit now?

Mr. Kenny: Yes, I am now referring to the exhibit attached to Exhibit 13.

Q. Was this for internal or external consumption, Mr. Pendleton, as you have described it hitherto, when you said:

“We wish it were possible for the members of the organization in the field force to be present. Obviously they cannot because of the nature and location of their work. They are very much a part of our group and are receiving their service buttons the same as those of us here. This welcome, by necessity, must go [174] to them by mail.”

A. Will you please state your question?

Q. What I am asking you, were the members of your field force treated as you say there, as much a part of the group as to receiving service buttons, as those who were there at this family day ceremony?

A. So far as the length of service connected with the organization they were. The service buttons were simply to define the number of years of service and were in no way any indication of the status of the employee in his relationship with the company.

Q. Are you the Morris B. Pendleton who presented service pins to Plomb Tool Company employees on that date?

A. Yes, sir; I am that person.

Q. And is Lionel Sanger who is listed under the

(Testimony of Morris B. Pendleton.)

heading "seven years," to the best of your knowledge, the plaintiff in this action?

A. Mr. Sanger is the plaintiff in this action, yes, sir; and who had seven years of connected service at that time.

Q. Do you know a man named Dave Gesick, referring to Exhibit 17?

A. Yes. Dave Gesick was an ordinary workman in the polishing or grinding department, I believe, and who at that time was elected by his fellow employees at the Los Angeles plant as the president of their employees' association. [175]

Q. On this exhibit there is a picture of a building and apparently two tennis courts. Can you identify that as any building on the Plomb premises?

A. That building was then erected on leased property, is a frame building without lining, about 30 feet by 60 feet, with a fireplace on one side and a counter at one end.

Q. Is it described as an employees' club house?

A. Yes, described as an employees' club house.

Mr. Kenny: That is all.

The Court: Any redirect?

Mr. Wall: If it please, your Honor.

Mr. Kenny: Oh, just one other important question which I did neglect.

Q. You stated, Mr. Pendleton, that the offer to Mr. Sanger had been made in clear and unmistakable terms; that is right, isn't it?

A. Yes, sir.

(Testimony of Morris B. Pendleton.)

Q. What was that offer, and clearly and unmistakably will you give us the terms of it now?

A. As I was with Mr. Sanger and Mr. Kerr in January of 1946, in Los Angeles, the offer was that he could have either the Kansas City territory as then constituted, and give up his other lines, and man it with the same amount of manpower that was in the territory at that time, or he could have the Chicago territory, which was an exceedingly good territory, [176] and if he chose, he could temporarily keep his other lines.

Q. What area was included in the Kansas City area under this offer?

A. Without referring to details and maps that I do not have with me, the Kansas City territory as then constituted was substantially the states of Missouri, Kansas, Nebraska, and Iowa, with a small portion of Nebraska against the Colorado line excepted therefrom, but for trading purposes it was those four states and, in addition, I believe the tip of Missouri across the river from St. Louis.

Q. The tip of Illinois?

A. I beg your pardon. The tip of Illinois across the river from St. Louis.

Q. What about South Dakota and Minnesota; was that in there?

A. No, that was not in the Kansas City territory as constituted in 1946.

Q. What was in the Chicago area?

A. The Chicago area as then referred to was

(Testimony of Morris B. Pendleton.)

substantially all of Illinois, Southern Wisconsin, parts of Michigan and Indiana.

Q. Now, you say that Mr. Sanger, if he took the Kansas City area, was to have the same amount of manpower. Explicitly what did that mean?

A. In 1946, under the territorial leadership of Mr. [177] Freund, there was in the Kansas City territory himself and two other men, all employees of the Plomb Company and all working for us exclusively.

Q. And what was Mr. Sanger to do if he took it over?

A. If Mr. Sanger took over the Kansas City territory as then constituted and gave up his other lines, it was my understanding from listening to the conversation that he would work there himself and with two other persons satisfactory to himself and the company.

Q. Two other persons, not three others?

A. A total of three in all.

Q. That is himself and two?

A. That is correct.

Q. And what was he to pay the other two persons?

A. The territory, as such, was at that time on a seven and one-half per cent commission, and that would be divided by negotiation between the company and the territorial representative in charge and the other two men.

Q. What was Mr. Sanger to get?

(Testimony of Morris B. Pendleton.)

A. Those splits of total territory commission are always negotiated in view of circumstances existing at the time.

Q. Was there anything clear or—well, was there any clear terms as to what that split was to be spelled out to Mr. Sanger?

A. I did not make any specific notes of the conversations [178] as conducted between Mr. Kerr and Mr. Sanger, for the reason that I was called in to listen to the discussions and they seemed to be perfectly clear and unmistakable to me at that time, and Mr. Kerr being charged with sales, I left the matter with him and Mr. Sanger.

Q. You have no idea as to what any terms as to the split were, whether they were clear and unmistakable or whether you knew about them at all?

A. I repeat what I told you before, and that is that when the persons are **finally determined as to** who work in any zone and their capabilities are known and the capabilities of the territorial leader are known, then 100 per cent of the commissions of the business from that zone at the then rates are divided between the personnel in the zone.

Q. Was it ever spelled out to Mr. Sanger as to what per cent he was to get?

A. Obviously, since he declined the offer of managing that zone as offered to him, it was wholly immaterial to determine what portion of a hundred per cent of the commissions would be paid to him or his men.

(Testimony of Morris B. Pendleton.)

Obviously, if the men that were to work with him there were the existing men who were trained and competent, then they would expect and be entitled to a larger percentage in relation to the head man's percentage. If they were green men put in, we would have another set of conditions. [179] And therefore the division of the compensation belonging to that zone between the men was immaterial, inasmuch as there was no desire expressed on Mr. Sanger's part to take that zone.

Q. Did you arrange for a conference between Mr. Sanger and Mr. Freund when he was out here?

A. No, I did not.

Q. Did you have any conversation with Mr. Sanger relative to this arrangement, other than that one conference in which you sat in with Mr. Kerr which you described?

A. The matter may have been discussed, although I never make it a policy in talking with people connected with the company or those who are seeking any connection to discuss terms and conditions of such a connection when they have already been set forth by the duly constituted official of the company who has to carry out such policies.

Mr. Kenny: That is all.

The Court: Who would determine how this 100 per cent of commissions was divided? Would the company be the final arbiter in the matter?

The Witness: As I have testified, your Honor, all the personnel in the zones are presently, and have been since '46 and in most cases, prior em-

(Testimony of Morris B. Pendleton.)

ployees of the company. Therefore, when you have a condition with what we now term zone managers, having working under him two employees of [180] the company reporting to the zone manager, therefore it is necessary for harmony within the zone that the employees working under the zone manager within the zone be compatible with the zone manager. Therefore, even though they are employees of the company, they report to the zone manager. Therefore, we are always very careful to see intra-zone employees who are competent, who will be good employees of the company but, at the same time, compatible with the zone manager so that they will work in a distant territory in harmony.

The Court: My inquiry is this: Suppose Mr. Sanger had accepted this proposition and he picked two highly compatible men and he said: "Well, now, gentlemen, I want 70 per cent, not $7\frac{1}{2}$. I will give each one of you 15 per cent." Both of them would have said no, they would not do that. Who is going to decide that dispute?

The Witness: That would be a possible situation. The company then enters the proposition. The two men that were offered 15 would say, "No; we can't make it on that small a cut." Then there would be no employees because they would not take the job.

The Court: Let us change my assumption a little bit. Suppose they just did not quit, but they were just disgruntled; they wrote in a letter to you, saying: "We think we are being very unfairly dealt with. Here, we thought we [181] would get each 25

(Testimony of Morris B. Pendleton.)

per cent, but here Sanger is offering us only 15 per cent each." What would you do about it?

The Witness: What we would do in that case would be to recognize that a disgruntled individual for an employee is no good for anybody, himself, the company, or the customers, and therefore we would recommend, if not insist, that there be a division of the gross 100 per cent of compensation within that zone so that the stipulated ability of the leader, which in this would be Sanger, we will assume, would be recognized, his experience, and still that the other two men in the zone would be given adequate compensation so that they would work happily.

The Court: Then would it be accurate to say under the proposal you made to Mr. Sanger it was for the company to decide ultimately what percentage of that $71\frac{1}{2}$ per cent from that territory he would receive?

The Witness: We have never found it necessary to arbitrarily rule on such a division. We have presently 14 zones and in all instances these matters have been happily resolved to the satisfaction of the men working under the zone managers, the zone managers, and the company.

The Court: Of course, the purpose of the provision of the contract is to furnish the ultimate authority on the subject. Would it be accurate to say that the ultimate authority in determining the amounts or proportion of this [182] seven and one-

(Testimony of Morris B. Pendleton.)

half per cent which Mr. Sanger would receive would be the company?

The Witness: In the final analysis, if there were an impasse, the company would have to determine that division.

The Court: Now, as I understood the proposals that have been testified to here with respect to handling other lines, if Mr. Sanger had accepted the Kansas City territory as then constituted, he would not be permitted to handle other lines; but if he had accepted the Chicago territory, he would have been permitted to handle other lines.

The Witness: As Mr. Kerr told us.

The Court: My question now is: What reason or basis in policy was there for the differentiation between the two territories in that privilege?

The Witness: Your Honor, as Mr. Kerr testified this morning, the magnitude of the job to be done in the Kansas City territory and the earnings therefrom had reached a point so high that it could not be satisfactorily served with other lines; and there, as Mr. Kerr indicated, a reasonable notice should be given of 30 or 60 days, I believe was his comment, in which to divest himself of his other interests so that he could have worked exclusively for the Plomb Tool Company, and at that time P & C, which was added to the line, and subsequently Penens was added to that zone.

Now, in the case of the Chicago territory, though it [183-184] was producing a volume of business in 1946 of in excess of four times the volume of busi-

(Testimony of Morris B. Pendleton.)

ness in 1941 in Sanger's then constituted territory, that figure was about four-sevenths of the business in the Kansas City territory. Then we felt that for a longer time, but not permanently, he might continue his other lines so that he might have that benefit, the benefit of them temporarily, but not to keep them permanently, because it would be inconsistent with our policy of having men divest themselves of other interests and work exclusively for the company.

The Court: Was it your judgment at that time that the Chicago territory offered Mr. Sanger was potentially as great a producer as the Kansas City territory?

The Witness: In our opinion, yes; because of the tremendous mass buying power in the thickly populated areas of the states of Illinois, Southern Wisconsin, Northern Indiana and portions of Michigan.

The Court: At the time that territory was offered Mr. Sanger how was it manned?

The Witness: That territory in Chicago at that time, in 1946, was manned by two men.

The Court: A district manager?

The Witness: And an assistant.

The Court: Did your company have any other sales representative who entered the service and applied for reinstatement [185] afterwards?

The Witness: Not that I recall.

The Court: Did you have any others who entered the service?

(Testimony of Morris B. Pendleton.)

The Witness: We had a great many employees who entered the service, I think approximately 300.

The Court: I mean comparable to Mr. Sanger.

The Witness: No, we had none.

The Court: I mean in that field.

The Witness: We had approximately 300 entered the service.

The Court: But they were not in the selling end of it?

The Witness: They were not in the selling end of the business.

Redirect Examination

By Mr. Wall:

Q. Mr. Pendleton, I believe you just said that the Kansas City territory in 1946 had developed to the point where you felt that it required the full time and attention of a district manager and at least two assistants. Do you have the figures showing the percentage of the company's total business which was produced by the Kansas City zone as constituted from time to time? In other words, can you say what percentage of the company's total gross business in 1941 and 1942 came from the Kansas City territory, and [186] the same figure for 1946?

A. I will attempt to answer your question this way, Mr. Wall, and if it is inadequate, why, rephrase it. But in 1939 the Kansas City territory as then constituted——

Q. That would be Mr. Sanger's territory at that time?

A. Yes. ——produced 5.2 per cent.

(Testimony of Morris B. Pendleton.)

Q. That is five and two-tenths per cent?

A. Per cent of the business done by our field sales force.

Q. I see, all right.

A. This is by our field sales force. In 1940 that had risen to 6.9 per cent; in 1941 it remained the same at 6.9 per cent; in 1942 under Mr. Sanger's leadership it dropped to 5.2 per cent of the field force total sales; and in 1943, when it was then under the leadership of our employee Freund, it increased to 5.9 per cent. In 1944, when manpower was further increased in the Minneapolis area, it increased to 9.7 per cent. In 1945, again with employee operating, 10.8 per cent; in 1946, 10.7 per cent; in 1947, 9.5 per cent; in 1948, 14 per cent; in 1949, 10.9 per cent as compared with an average percentage of 1939 to 1942 of about 6 per cent.

The Court: Have you comparable figures for the Chicago territory?

The Witness: The Chicago territory produced in 1939, 5.4 per cent; 1940, 4.5 per cent; 1941, 3.0 per cent, that [187] is of total sales of the total sales force. That was under manufacturers' agents. In 1942 under employee operation it increased then from an average of around 4 per cent to 4.6 per cent; 1943, 6.0 per cent; 1944, 4.8 per cent; 1945, 3.6 per cent; 1946, 4.2 per cent; 1947, 4.5 per cent. Then we curtailed the territory when it was not accepted by Mr. Sanger and the percentages are not longer comparable.

(Testimony of Morris B. Pendleton.)

Q. (By Mr. Wall): During your cross-examination, Mr. Pendleton, you stated in response to a question by Mr. Kenny that there was a good reason for the fact that the total sales in the Kansas City territory in 1949 amounted to only \$295,000 as compared with higher figures in earlier years. You were not given an opportunity to state the reason. Will you please do so?

Mr. Kenny: I reserved that opportunity to you.

Mr. Wall: Thank you.

A. The reason for the total sales of the Plomb Tool Company in 1949 dropping from—dropping in 1949 on a national basis as well as in the Kansas City territory is due to the fact that our company spent most of 1949 in recovering from the adverse effects of litigation that we had with respect to a trade-mark, when we had our field force changing the signs on some 80,000 display boards, answering innumerable questions, and the executives at headquarters were spending endless hours in negotiation and in settlement and with fear, [188] which materially ate into our time and reduced our effectiveness. And when that was finally disposed of in 1949, our incoming orders, beginning with March, 1950, have materially improved over those heretofore, and our percentage in the industry is again climbing as we have gotten over the devastating effects of that litigation.

Q. As the result of that litigation it was necessary, was it not, for you to change your trade-mark

(Testimony of Morris B. Pendleton.)

on your tools from the word "Plomb" to the word "Proto"?

A. We had to change the trade-mark on our tools and on our advertising. In other words, we discontinued the trade name "Plomb" and substituted the trade name "Proto" with all that that implies throughout the corporation.

Q. Mr. Pendleton, in your conversation with Mr. Sanger in 1946 with reference to his application for reinstatement, insofar as you know did Mr. Sanger ever question the basis of division between the personnel of the particular territory of the gross commission payable to that territory?

A. Not in my presence has it ever been raised.

Q. He did not raise that question with respect to either the Kansas City or the Chicago territories that were offered him?

A. No. At no time was that raised.

Mr. Wall: That is all.

The Court: Any further questions? [189]

Mr. Wall: May I ask one more question, your Honor?

The Court: Yes, you may.

Mr. Wall: Thank you.

Q. Mr. Kenny showed you Exhibit 17, which was a letter from Mr. Gesick as president of the Plomb Employees Association, and called your attention to a sketch at the top of the paper which shows a building and some tennis courts. You described the building. I will ask you whether there are tennis courts adjacent to that building as a part of the club house?

(Testimony of Morris B. Pendleton.)

A. No more. That is used for steel and material storage.

Mr. Wall: Thank you. That is all.

The Court: Anything further from Mr. Pendleton?

Mr. Kenny: Just a few questions, if the court please.

Recross-Examination

By Mr. Kenny:

Q. Judge Mathes asked you to furnish comparable figures as to the percentage of the business done in the Chicago territory and in the Kansas City territory. Am I correct in recapitulating your testimony to this effect, that the average of the Plomb business done nation-wide that was done in the Kansas City area when Mr. Sanger ran it, that is, between '39 and '42, was six per cent, and that the average of your business that was done in Chicago in 1946 and in '47 was about four per cent of the nation-wide business? Am I [190] correct in that?

A. Those percentages are correct of nation-wide business, but I point out the fact that dollar-wise, that 4.2 per cent in 1946 as compared to six per cent in the 1932 to 1942 area was still four times the sales volume that was done in the Kansas City area in 1941.

Q. And also, the six per cent would be four times six per cent, in other words, wouldn't it? That is, without being argumentative, the same increase would go in the Kansas City area, that is, six per

(Testimony of Morris B. Pendleton.)

cent was dollar-wise a lot more in 1946, wasn't that correct?

A. In 1946 the Kansas City territory produced in 1946 \$736,000, or seven times what it produced in dollars in 1941.

Q. In Kansas City, after '42, you know that Pratt-Whitney located a plant in Kansas City after that? A. Yes.

Q. North American Aviation located a plant in Kansas City after that? A. Yes.

Q. Remington Arms? A. Sure.

Q. Boeing Aircraft? A. Yes.

Q. Cessna? A. Yes. [191]

Q. Those all occurred during that war period; they located in and around the Kansas City territory, did they not?

A. The Kansas City territory had its share of war plants just the same as every other territory had its share.

Mr. Kenny: All right. No further questions.

The Court: You may step down, Mr. Pendleton. Your next witness.

Mr. Wall: I will call Mr. Joseph Leach.

JOSEPH G. LEACH,

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Joseph G. Leach.

Direct Examination

By Mr. Wall:

Q. What is your business or occupation, Mr. Leach?

A. Supervisor of sales distribution for Plomb Tool Company.

Q. Are you employed by the Plomb Tool Company? A. Yes, sir.

Q. And as supervisor of sales distribution what in general are your duties?

A. My duties are to establish sales by various classification of tools, and also by classification distribution of [192] tools into particular territories and into particular zones, and in establishing commissions upon the over-all zone basis of territory.

Q. When you say establishing commissions do you mean computing commissions in accordance with rates established by other persons in the company? A. That is correct.

Q. And as a part of your activities as supervisor or sales distribution are you familiar with the territories or zones to which various men are assigned from time to time? A. I am.

Q. You are familiar also, I take it, with the identity of the men assigned to particular territory at particular times? A. Yes, sir.

(Testimony of Joseph G. Leach.)

Q. And I take it you are also familiar with the commission rates in effect from time to time?

A. Yes, sir.

Q. How long have you held this position of supervisor of sales distribution?

A. 10 years and nine months, I believe.

Q. That would be since sometime in——

A. April the 1st of 1940.

Q. April the 1st of 1940. Can you state what the commission rates were in effect in the month of January, 1946? [193]

A. In the month of January, 1946—if you don't mind, I have my notes on these various commissions—was seven and one-half per cent.

Q. Does that apply to all types of products that are sold by the company?

A. With the exception of some little bit of contract custom-made tools which went at various rates.

Q. But the seven and one-half per cent applied, did it, to all of the standard stock tools that the company produced?

A. To all standard stock tools to all representatives.

Q. That applied to all representatives?

A. To all representatives; yes, sir.

Q. Can you state when that seven and one-half per cent commission rate was established or when it went into effect?

A. It was established January the 1st, that is, it was put into effect on January the 1st, 1944.

(Testimony of Joseph G. Leach.)

Q. And had been in effect continuously up until January, 1946, is that it? A. Yes, sir.

The Court: Is it still in effect?

The Witness: No, sir. It has been changed two or three times.

Q. (By Mr. Wall): There have been changes made in commission rates since 1946, is that correct?

A. Yes, sir; there have been changes. [194]

Q. What were the commission rates in effect at the end of 1949?

A. At the end of 1949 our commission rates were eight per cent to regular jobbers.

Q. Now, you mean the salesman gets a commission of eight per cent on a sale to a regular jobber?

A. Eight per cent commission to sales to regular jobbers.

Q. Yes.

A. Seven and one-half per cent commission on sales to redistributing jobbers and six per cent commission on sales to wholesalers.

Q. I see. There were other changes between January of 1946 and this end of 1949 period that I have mentioned here, is that correct?

A. Yes, sir; there were other changes.

Mr. Wall: Your Honor, unless you or Mr. Kenny are interested in those periodic commission rate changes, I had not intended to bring them out in all particulars. I will be happy to have the information put in the record if you desire.

Mr. Kenny: Do you have it in tabular form or any way?

(Testimony of Joseph G. Leach.)

Mr. Wall: I haven't it in tabular form.

Mr. Kenny: I am not interested in it and I would be interested in any short-cutting on the presentation of it.

Mr. Wall: Very well.

Q. What is the basis of compensation—well, let me ask [195] you, first: These commissions you have testified to with respect to January, 1946, and the end of 1949, were those in effect for the Kansas City territory as constituted at those particular times?

A. They were; yes, sir.

Q. What is the present basis of compensation to salesmen operating in the Kansas City territory?

A. Well, that is a little more complicated. The present basis of the Kansas City territory is that each individual man in the territory, including the zone manager, is on a salary and expense basis plus a commission rate basis starting at one per cent, based on the first \$5,000 of sales. In other words, on the first \$5,000 he receives one per cent additional commission; on the next five he receives two per cent; on the third five he receives three per cent; on the fourth five he receives four per cent; and anything over \$25,000 or \$20,000 in sales he receives five per cent. Then in addition to that, their basis now is on consolidated sales not only of Plomb Tool Company's but its subsidiaries, P & C and Penens Corporation.

Q. Are those computed on a monthly basis, those \$5,000?

(Testimony of Joseph G. Leach.)

A. They are computed on a monthly sales basis by individual men.

Q. I see. [196]

A. And in addition, they are compensated with one per cent individually on P & C sales, sales from P & C, and also the zone manager or the head territorial man receives one-half one per cent commission on his sub-men or men who are working for him. He receives one-half one per cent override on their sales.

Q. Now, do I understand correctly, then, that the zone manager or head man receives not only the salary plus expense plus graduated commission on his own sales, but in addition to that now gets one-half one per cent commission on the sales made by other salesmen in the territory; is that correct?

A. That is correct.

Q. And with respect to P & C business, you mentioned an extra one per cent on that; is that an overriding?

A. That is an overriding commission. In other words, P & C sales and Penens sales and Plomb Company sales are consolidated for establishing these commissions.

Q. Have you finished now describing the compensation setup at the present time?

A. Well, as it exists now, we also allow an additional five per cent commission on the first shipment of new orders, of a new order.

Q. Would that be a new account?

A. Of a new account.

(Testimony of Joseph G. Leach.)

Q. When was the compensation set up that you have just [197] described as being in effect now put into effect in the Kansas City territory?

A. On January the 1st of 1950.

Q. I take it, then, that since January 1st of 1950 you have given up the former practice that has been described here of dividing the total commissions payable on the business of the territory between the men in the territory according to an agreement between them and the company?

A. In the Kansas City territory, yes, sir.

Q. Are there other territories which are presently on the same type of compensation basis as applies to Kansas City? A. There are.

Q. Can you tell me, Mr. Leach, what the basis of the division of commissions between the men in the Kansas City territory was in January of 1946? I mean, now, the territory which was then under the supervision of Mr. Freund with two other men?

A. At the end of 1946, to my recollection, it was——

Q. I am asking that as of January, 1946.

A. January of 1946—I think it went the whole year—was, the territorial manager or zone manager received 60 per cent of total earnings and his other men each received 20 per cent of the total zone earnings. As Mr. Pendleton has testified, those rates varied between zones and at times, [198] even down to men. For instance, if a man is added, naturally, the rate has to be adjusted as to the split.

(Testimony of Joseph G. Leach.)

Q. The split was on a different basis then in certain other zones, even at that time?

A. That is correct; yes, sir.

Mr. Wall: Mr. Kenny, Mr. Leach is the man who can explain the zone compensation figures which I handed you this morning and which have not yet been put in evidence, and I think it might be well to have the basis of those figures made clear to everyone.

Mr. Kenny: At this time plaintiff will offer as Plaintiff's Exhibit next in order—I believe that is 49?

The Clerk: 49.

Mr. Kenny: —three sheets consisting of a tabulation of Commissions and Reimbursed Expenses in Zone 4 for the Plomb Tool Company, P & C Hand Forged Tool Company, and Penens Corporation as a single exhibit.

The Court: During what period?

Mr. Kenny: That would be the period '46 to October, 1950.

The Court: Is there objection to the offer?

Mr. Wall: No objection, your Honor.

The Court: Received into evidence.

Q. (By Mr. Wall): Mr. Leach, I show you first Plaintiff's Exhibit 48, which constitutes three pages showing the Commission and Reimbursed Expenses for the zone manager of Zone 4, the first sheet being headed The Plomb Tool Company, the [199] second sheet being headed P & C Hand Forged Tool Co., and the third sheet being headed Penens Corpora-

(Testimony of Joseph G. Leach.)

tion. Did you prepare these schedules at my request?

A. I prepared the schedules. Yes, sir; I prepared them. I cannot testify other than from P & C records on P & C figures only for the year 1950, although they are as reported to us by P & C.

Q. Yes. Well, I understand there is no question as to the figures. We have stipulated as to those.

A. Yes, sir.

Q. Calling your attention to the first sheet of Exhibit 48, which is the Plomb Tool Company Commission and Reimbursed Expense for the zone manager of Zone 4, the first column is captioned "Year," the second column "Commission," and the third column "Expense." What represents for the year 1946 there the gross commission or the gross amount paid to the zone manager of Zone 4?

A. Well, the total of the two is the gross amount paid.

Q. You mean the total of the commission and the expense figures?

A. That is right, because he paid his own expenses and was reimbursed by the company. His actual earnings, of course, are below the commission if he actually spends what he turns in as expenses.

Q. The expenses are expenses that he pays but which [200] are charged against the gross commissions coming to him, is that correct?

A. That is correct.

Q. So that his net figure for any one of these periods would be the figure in the column headed "Commission"?

A. That is correct.

(Testimony of Joseph G. Leach.)

Q. I take it that the same applies to—well, there is no expense on the other.

A. The expense is all absorbed in the one company.

Q. Further referring to the first sheet of Exhibit 48, I note that the fourth item down the column is "To Sept. 30, 1949." I take it that covers the first nine months of 1949?

A. It is the first nine months.

Q. The next item is "Oct.-Nov.-Dec. 1949," which is the last three months of that year.

A. That is correct.

Q. And the next item being "Year 1949" is the total of the two preceding items, is that correct?

A. That is correct.

Q. In other words, in totaling the column at the bottom, the year 1949 is in there twice in two different ways?

A. That is correct.

Q. I believe you stated a few moments ago that since January 1, 1950, in this zone 4—which, incidentally, is the Kansas City territory, is it [201] not?

A. That is correct; yes, sir.

The Court: We will take the afternoon recess of five minutes.

(Short recess.)

Q. (By Mr. Wall): Mr. Leach, referring to Exhibit 48, the sheets that I was showing you before the recess, I note that the P & C and Penens sheets show no commissions for the year 1950. Do I understand your prior testimony to be that the Plomb

(Testimony of Joseph G. Leach.)

Tool Company figures for 1950 give you P & C and Penens commissions? A. They do.

Q. On this Exhibit 48 showing Commission and Reimbursed Expenses for Zone Manager Zone 4 appears, as I understand, the compensation paid to Mr. Freund for the years there set forth?

A. That is correct.

Q. Now I show you Plaintiff's Exhibit 49, which, again, is made up of three sheets, one for The Plomb Tool Company, one for P & C, and one for Penens, and which on the Plomb Tool Company sheet shows the same yearly break-down as on Exhibit 48, but shows a double column of commission and expense under the name "Freund," under the name "Folkerts," "Lohr," and several other names. Does that represent the total compensation paid by Plomb Tool Company with respect to the Kansas City territory as it existed from time to time during that period? [202] A. It does.

Q. The column at the lower right-hand corner headed "Total" shows the total commission and expenses paid in the entire territory, is that correct?

A. In the entire zone; yes, sir.

Q. The column headed "Freund" in the upper left-hand corner, I take it is identical with the information on Exhibit 48, is that correct?

A. It is.

Q. And the columns under the other names show amounts paid to other salesmen employed in that territory from time to time?

A. That is correct.

(Testimony of Joseph G. Leach.)

Q. And the P & C and Penens sheets which are a part of Exhibit 49 are prepared on substantially the same basis, are they? A. Yes, sir.

Q. And I take it it is true in this case also that the figures for the year 1950 paid by Plomb Tool Company include commissions on P & C and Penens products? A. That is correct.

Q. Mr. Leach, there has been testimony here to the effect that the Kansas City territory as constituted in January, 1946, did not include the state of Minnesota and a portion of the state of South Dakota which had been in 1942 [203] included in Mr. Sanger's territory; is that correct?

A. Yes, sir.

Q. Have there been any times in the period since January, 1946, when the Kansas City territory included the areas which were not within Mr. Sanger's pre-war territory?

A. Yes, there has. In, I believe, 1947 part of the Chicago area was included in zone 4.

Q. And there have been changes in the zone from time to time, and the figures, then, that are included here in Exhibits 48 and 49 represent the earnings from that zone as it was constituted from time to time, sometimes having less territory than Mr. Sanger's old territory had, and other times having more, is that correct? A. Yes, sir.

Q. Mr. Leach, did you have any conversation with Mr. Sanger in Los Angeles during January of 1946? A. Yes, sir.

Q. Did you have any conversation in which his

(Testimony of Joseph G. Leach.)

application for reinstatement with the company was discussed or mentioned?

A. Yes, sir; just in a matter of fact way.

Q. I beg pardon? A. Yes, sir; I did.

Q. Will you state what, if anything, Mr. Sanger said to you in that regard?

A. Well, on his various trips in and out of the office [204] he would stop at my office and we would get into conversation. And he said—I remember clearly that when he first came in he said he was in to get his old territory back. And perhaps two or three meetings later, that I have had occasion to converse with him at my desk in my office, why, he told me that he was offered his territory back if he would give up his other lines.

Q. Did he state whether or not he intended to accept it on that basis?

A. He said he was not——

Mr. Kenny: I think that these leading questions in a conversation of this kind are objectionable.

Mr. Wall: I beg your pardon, Mr. Kenny. I think the objection is well taken. I will withdraw the question.

Q. Was there anything further said between you in connection with that subject?

A. Well, not other than that he just said that he was not going to accept it because he couldn't have his other lines.

Mr. Wall: No further questions.

Mr. Kenny: No questions.

The Court: You may step down, Mr. Leach. Your next witness.

Mr. Wall: I will call Mr. Baumgardner for just a couple of questions. [205]

HENRY C. BAUMGARDNER,
called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Henry C. Baumgardner.

Direct Examination

By Mr. Wall:

Q. Mr. Baumgardner, you are an officer of the Plomb Tool Company, are you?

A. Yes, I am.

Q. What is your office?

A. I presently am vice-president, treasurer, and comptroller.

Q. How long have you been connected with the Plomb Tool Company?

A. Since August, 1945.

Q. In your capacity as treasurer and comptroller are the records of the company with respect to the financial transactions under your custody and control?

A. Yes, they are.

Q. Have you had a check made of the company's records in order to determine whether or not payments or deductions for social security were taken from the compensation paid to sales representatives prior to January 1st, 1942?

(Testimony of Henry C. Baumgardner.)

A. Yes. I personally examined the duplicate copy of [206] the quarterly social security report for the years 1938, '39, '40, '41, and '42, and no deductions were taken until 1942.

Q. Were deductions taken in 1942 with respect to compensation paid to Mr. Sanger?

A. No, no deductions were taken.

Q. Were deductions taken in 1942 with respect to the sales representatives who were then on a full-time employee basis?

A. Yes, such deductions were taken.

Mr. Wall: That is all.

The Court: You may step down, Mr. Baumgardner.

Mr. Wall: Defendant rests, your Honor.

Mr. Kenny: Call Mr. Sanger.

The Court: This is for rebuttal?

Mr. Kenny: That is correct.

LIONEL H. SANGER,

the plaintiff herein, recalled as a witness in his own behalf in rebuttal, being previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Kenny:

Q. Calling your attention to the conversations held between you and Mr. Kerr and Mr. Pendleton in January of 1946 here in Los Angeles, will you state what was said between [207] you relative to

(Testimony of Lionel H. Sanger.)

the Chicago territory and relative to the Kansas City territory?

A. It was a general conversation where Mr. Pendleton just dropped in a few minutes. Most of the conversation was with Mr. Kerr. And they mentioned Chicago territory in addition to the Kansas City territory.

Q. Now, can you state as explicitly as possible everything that was mentioned about the Chicago territory, first, and what either one of these gentlemen said and what you said in response to that.

A. In regard to the Chicago territory they said that the sales volume was very unsatisfactory.

The Court: Who said it?

The Witness: Mr. Kerr.

The Court: He isn't "they," is he?

The Witness: No, sir.

The Court: You tell us. We were not there.

"I will tell you what I will do, like this." Now, you tell us.

The Witness: Yes, sir. Mr. Kerr mentioned that the Chicago territory volume was very unsatisfactory and that he had been thinking of putting the two territories together, and that possibly something could be worked out whereby I could take both territories and have Mr. Freund and the assistants work for me in that territory. And, as I [208] remember the conversation as to figures, he mentioned that I would get approximately 40 per cent, and I think the 40 per cent came mostly from the Kansas City—you see, the monies accumulated—as Chicago

(Testimony of Lionel H. Sanger.)

was not doing much at that time, and there was going to be a definite change there. And he said that he was going to send for Mr. Freund and that when he arrived in California, he would hold a conference with him and then I get in touch with him. And I don't recall any further conversations. I did not get to see Mr. Pendleton again after that first meeting.

The Court: Did he ask you to make him some offer?

The Witness: Yes, sir. When I left, he says—after I called for about two and a half to three weeks I did not visit the plant again. He said, “The best thing you can do, don't stay over on our part.” He said, “You go back to Kansas City, give us some propositions, we will be thinking in the meantime out here, and you will hear from us and we will hear from you.”

The Court: That is Mr. Kerr?

The Witness: That is Mr. Kerr. I didn't see Mr. Pendleton after that. Mr. Pendleton was reported as having gone east by his secretary and I stopped calling him except the last day before I left, I called Mr. Pendleton once more and he was still in the east.

Q. (By Mr. Kenny): Did either Mr. Kerr or Mr. Pendleton [209] state to you that you could have the Chicago territory and your old lines?

A. Not to my recollection, no, sir; because it is so ridiculous working only one part of the United States for Plomb Tool Company. I don't think Mr.

(Testimony of Lionel H. Sanger.)

Kerr realized or realizes that it could not be done, and it was not offered.

Q. That is, it would be ridiculous to be selling the other lines in the Kansas City territory and the Plomb tools in the Chicago territory?

A. I could only be giving—if I divided my interests, I could only give half to the Plomb Tool Company and half to the other line, at best.

Q. Did you have a discussion to that effect with Mr. Kerr or was there no discussion about it?

A. There was no discussion, to my recollection.

Q. Did either Mr. Kerr or Mr. Pendleton say that you could have the Kansas City territory without Minnesota and South Dakota, but keeping additional men on the job?

A. The only way they mentioned that was that they would send for Mr. Freund, and then they would contact me, and I heard nothing after that, except the time when Mr. Kerr came through, and then it was a friendly visit at the Muelbach Cafe—Muelbach Hotel in Kansas City, and he mentioned that it was not up to him; that Mr. Pendleton was relying on this eastern research and he was 100 per cent sold on a direct man, [210] and that was it. And after that I went to Selective Service.

Q. Did Mr. Kerr tell you that you would get 40 per cent and the other two men would get 30 per cent apiece in the Kansas City territory?

A. He did go over what the deal was if anything went further of selecting, you know, after the Freund conversation. He said, "We don't pay direct

(Testimony of Lionel H. Sanger.)

like we did, that is, the one man. It is a split basis and the manager of the zone gets 40 per cent and 60 per cent is divided among the other two men."

Q. Did you discuss your rights under Selective Service either with Mr. Kerr or Mr. Pendleton?

A. I don't recall if it was mentioned specifically other than when I left. I told them that I didn't want to take the steps of going to Selective Service, and I was informed by Mr. Kerr that I did not have any rights under Selective Service, but they did want me with them because they respected my sales ability.

The Court: In January?

The Witness: Yes, sir.

Q. (By Mr. Kenny): When was the first time you were told that? Was that in January?

A. The first time was in, I think, the first meeting in December, is the way I recall it, but it was within a week period there.

Q. When you saw Mr. Kerr in Chicago did you discuss [211] with him your previous correspondence with him while you were in the service about your post-war plans?

A. When I saw him—I don't recall when you mean I saw Mr. Kerr.

Q. Mr. Kerr testified that you and he met at the Auto Parts show in Chicago.

A. We didn't go into any details there that I recall. He just said, "Well, as long as you are coming out to the Coast, I will see you when you get out there." That is the way I recall.

(Testimony of Lionel H. Sanger.)

Q. You recall I asked Mr. Kerr about the practice of selling tools along with other automotive parts lines. Can you tell us whether or not that practice requires additional men or manpower, that is, whether other lines are carried in addition to a tool line in the automotive field?

A. Well, the reason I feel it applies more or less to a territory in that regard is the distance between towns in the territory. I had carried the Plomb Tool Company line along with the parts lines since 1931, and I believe I showed an increase practically every year on the Plomb Tool Company. When I started there they had no customers, and in most cases after calling on one customer in the morning, at the best, and another one in the afternoon, when you once get away from the larger cities like St. Louis, Kansas City, Omaha, time doesn't mean much because there is too much [212] distance involved to make the next town. So therefore that time is used and there is actually no further effort required than to sell more than one line.

Q. In other words, as you go into a small town you have got to devote that whole day to that town, anyway; you have gone that far and that time is spent in offering all the lines that you have?

A. Yes, sir.

Mr. Kenny: You may cross-examine.

Mr. Wall: No questions, your Honor.

The Court: You may step down, Mr. Sanger.
Any further rebuttal?

Mr. Kenny: No, no further.

The Court: Does plaintiff rest?

Mr. Kenny: We rest.

Mr. Wall: Defendant rests.

The Court: Will you be ready to argue the matter tomorrow morning at 10:00 o'clock, gentlemen?

Mr. Wall: Yes, your Honor.

The Court: Very well, we will hear the oral argument tomorrow morning at 10:00 o'clock. The trial will be recessed until that time. Court will adjourn.

(Whereupon an adjournment was taken until 10:00 o'clock a.m. of the following day, Thursday, December 21, 1950.) [213]

Friday, January 5, 1951, 2:00 P.M.

The Court: You may proceed, Mr. Wall.

Mr. Wall: Thank you, your Honor. At the outset, may I express my appreciation to the court and counsel for their courtesy and consideration for me at our last session?

Mr. Somers has called to my attention, your Honor, that neither party offered into evidence the pre-trial stipulation which is on file in this matter. I do not know what your Honor's practice is in that regard, but I should like to offer the pre-trial stipulation in evidence by reference to the filed document, if I may do so.

The Court: Yes. It is in the record, but I think the better practice is to offer it into evidence and give it an exhibit number, and then on appeal it won't be overlooked.

Mr. Wall: I think that is the better practice, too, your Honor.

The Court: Is there objection?

Mr. Kenny: No objection.

The Court: Very well, the evidence is opened and the Pre-Trial Stipulation filed—do you have the filing date on that?

Mr. Wall: I think so.

The Court: Filed September 20, 1950——

Mr. Wall: That is correct, your Honor.

The Court: ——is received into evidence as Plaintiff's Exhibit. Do you have the next exhibit number, Mr. Clerk?

The Clerk: I haven't my notes here, your [214] Honor.

Mr. Wall: I think it will be 50, your Honor.

The Court: It will be Exhibit 50 according to my notes. [215]

* * *

Wednesday, January 9, 1951—1:30 P.M.

Excerpt

The Court: This case would not be any clearer to me on the principal question in it if we discussed it indefinitely. It has been most helpful to have your argument, but it is a close question whether this plaintiff is so far an independent contractor as to be without the protection of the statute. It is a doubtful question, but I will resolve the doubt in his favor and hold that at the time he left the service he held a position in the employ of the defendant

within the meaning of the Selective Service Act of 1940 as amended. That is a phrase of indefinite content, but I am of the opinion that it is broad enough to cover this plaintiff, and so hold.

As far as the defense of laches is concerned, the company itself contributed to the delay, and I find that inaction on the part of the plaintiff and delay on his part did not result in any change in the real situation of the company to its prejudice. The plaintiff is entitled to be restored to a position of like seniority, status and pay equivalent to that left by him.

The offer made to him upon his return, for the reasons heretofore mentioned, in my view, was not an offer of reinstatement. I do not think the company intended it to be such, but even though, as has already been said, the company [216] might not have intended it, the test is whether it was. In my view it falls short of being an offer of reinstatement to a position of like seniority, status and pay, (1) by reason of the indefiniteness of the commission rate, and (2) by reason of the fact that although one other salesman who had not entered the service was being permitted to handle other lines in another territory, that privilege which this plaintiff had enjoyed prior to the time he entered the service was to be denied him in the offer made.

I find that the plaintiff is entitled to be restored to the position in charge of the Kansas City territory—the territory as constituted at the time he entered the service—at a commission rate the same as when he entered the service, for a period of one

year following his return from the service and his application for reinstatement, which would be early in January of 1946 and, for all practical intents and purposes, would be for the period of one year, 1946.

The defendant having wrongfully refused to reinstate the plaintiff, the plaintiff is entitled to damages from the defendant for loss of earnings during the year of 1946, plus interest thereon as provided by law, and less any tax or other deductions required by law.

I do not attempt here to find the amount. I will leave that to you gentlemen to attempt to reach it. If you cannot arrive at it, I will hear both of you and determine it. [217]

But as far as the damages for the defendant's unlawful refusal of re-employment during the year 1946, I find that what had been promised by the law to the plaintiff was a commission on all sales of the Plomb Tool Company in the Kansas City territory as constituted prior to the entry of the plaintiff into the service, at the commission rate then paid him, plus what he would have earned and did earn by the handling of other lines as was his practice at the time he entered the service, less his expenses which he customarily paid prior to entering the service; and I will make a finding as to what those were if you gentlemen cannot arrive at that. This is for the year 1946.

It will be ordered that the defendant Plomb Tool Company be enjoined and ordered forthwith to reinstate the plaintiff as head of the Kansas City territory as presently constituted, and at such rates

of compensation, under such financial arrangement as now exists for the head of that territory.

The defendant and its officers, agents, and those acting for it are enjoined not to discharge the plaintiff from such position without cause for a period of one year from the date of such restoration. If the provisions for restoration are not complied with within 10 days after written notice of entry of judgment, the petitioner will be given the opportunity to apply to the court for further relief, and the court will reserve jurisdiction to make any further orders that may be [218] necessary in the case.

Counsel for the plaintiff will prepare findings of fact, conclusions of law, and judgment and submit them under Local Rule 7 within five days. Perhaps you had better have 10 days, I suppose.

Mr. Kenney: Yes. I am going to ask the reporter to write up everything after I stopped talking. Do you want a copy?

Mr. Wall: Yes, I would like a copy.

Mr. Kenny: Then we can draw that. 10 days would probably be easier.

The Court: I will adopt the plaintiff's view as to the damages as far as the period is concerned. It will be limited to the year 1946, which I find to be the period of one year during which the defendant would have been required by law to retain the plaintiff in its employ at like pay, within the meaning of the statute, had the plaintiff's rights under the Selective Service Act, as I find them to exist, been observed. However, as I stated during argument, if you gentlemen cannot agree upon those damages but

you can agree upon the so-called damage for delay period, I would award damages from the date of filing of the complaint down to date.

I believe that covers everything.

Mr. Kenny: Yes, sir. [219]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 12th day of January, A.D. 1951.

/s/ ALBERT H. BARGION,
Official Reporter.

[Endorsed]: Filed January 22, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 31, inclusive, contain the original Complaint; Answer to Complaint; Findings of Fact and Conclusions of Law; Judgment for Plaintiff; Notice of Appeal; Statement of Points on Which Appellant Intends to Rely on Appeal, and Designation of Record on Appeal, which, together with copy of reporter's transcript of proceedings on December 19 and 20, 1950, and January 5 and 9, 1951, in three volumes, and original plaintiff's exhibits 1 to 51, inclusive, and original defendant's exhibits A to U, inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 28th day of February, A.D. 1951.

[Seal]

EDMUND L. SMITH,

Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12873. United States Court of Appeals for the Ninth Circuit. The Plomb Tool Company, a Corporation, Appellant, vs. Lionel H. Sanger, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 2, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12873

THE PLOMB TOOL COMPANY, a Corporation,
Appellant,

vs.

LIONEL H. SANGER,

Appellee.

STATEMENT OF POINTS

Appellant above named hereby states the following points on which it intends to rely on this appeal from the judgment rendered by the United States District Court herein:

1. Appellee's claims for reinstatement and damages under the Selective Training and Service Act of 1940, as amended, are barred by the Statute of Limitations, to wit, Section 338, Subdivision 1 of the Code of Civil Procedure of the State of California; and the District Court erred as a matter of law in concluding to the contrary.
2. Appellee's claims for reinstatement and damages are barred by laches and delay on his part; and the District Court's finding that plaintiff was not guilty of laches is not supported by any substantial evidence and is contrary to the evidence.
3. Appellee's pre-war status was that of an independent contractor, and hence he is not entitled to reinstatement or damages under the Selective

Service and Training Act of 1940, as amended; and the District Court's conclusion that appellee left a position in the employ of appellant within the meaning of said Act and that his pre-war status was not that of an independent contractor is contrary to law, and its finding to the same effect is not supported by any substantial evidence and is contrary to the evidence.

4. Appellee is not entitled to the relief granted by the District Court, even assuming, without conceding, that he left a position in the employ of appellant within the meaning of the Selective Service and Training Act, and that his claim is not wholly barred by the Statute of Limitations or by laches, in that:

(a) Appellant's circumstances had so changed by the time of appellee's application for reinstatement as to make it unreasonable, within the meaning of said Act, to require appellant to restore appellee to his pre-war status; and the District Court's conclusion to the contrary is contrary to law and is not supported by the findings of fact or by any substantial evidence.

(b) The appellant fully satisfied any obligation it may have had to appellee by offering him "a position of like seniority, status and pay" within the meaning of said Act, and his rejection of such offer bars his claims to reinstatement and damages; and the District Court's conclusion to the contrary is contrary to law and is not supported by the findings of fact or by any substantial evidence.

5. Assuming, without conceding, that appellee is entitled to any relief, the relief awarded appellee by the District Court is excessive as a matter of law in that:

(a) By reason of his delay in filing this action, appellee is not entitled to recover any damages for loss of earnings for any period prior to the commencement of this action on September 22, 1949; and the District Court erred in awarding him damages measured by his loss of earnings during the calendar year 1946.

(b) The Selective Service and Training Act guarantees a veteran only one year's re-employment and it was therefore error for the District Court to award appellee damages measured by his loss of earnings during the entire calendar year 1946 in addition to ordering appellant to reinstate appellee and enjoining appellant not to discharge him without cause for the period of one year.

(c) If appellee was entitled to any damages measured by loss of earnings for the year 1946,

(i) Such loss of earnings should have been computed on the basis of the commission rate of $7\frac{1}{2}\%$ actually in effect for all appellant's sales representatives during that year; and the District Court erred as a matter of law in computing such loss of earnings on the basis of appellee's pre-war commission rates of $12\frac{1}{2}\%$ and $8\frac{1}{2}\%$; and

(ii) Such loss of earnings should have been computed on the basis of appellant's Kansas City territory as the same was constituted in 1946; and the District Court erred as a matter

of law in computing such loss of earnings on the basis of appellee's larger pre-war territory.

(d) Any damages awarded appellee for loss of earnings are subject to offset for amounts earned by appellee in other employment during the same period; and the District Court erred as a matter of law in refusing to allow such offset for appellee's earnings from personal services rendered to others during the year 1946.

O'MELVENY & MYERS,

SIDNEY H. WALL,

By /s/ SIDNEY H. WALL,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 12, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION AND APPLICATION FOR CONSIDERATION OF ORIGINAL EXHIBITS

It Is Hereby Stipulated by and between appellant and appellee above named, through their respective attorneys of record, that subject to the approval of this Honorable Court the following original exhibits in the above-entitled cause which have been transmitted to this Court by the Clerk of the United States District Court for the Southern District of California, Central Division, may be considered by

this Honorable Court in their original form without printing:

1. Plaintiff's Exhibit 13, consisting of a Plomb Tool Company inter-office memo dated April 8, 1940, from Dillon Stevens to Lionel Sanger on the subject of "service button" to which is attached a copy of a program for a Plomb Tool Company Family Day Party (which program would be difficult to reproduce accurately by printing).

2. Plaintiff's Exhibit 26, consisting of a copy of page 3 of the "The Anvil Chorus" dated January 1, 1943 (being a page from a printed paper which would be difficult to reproduce accurately by printing).

3. Plaintiff's Exhibit 32, consisting of a business card of appellee.

4. Defendant's Exhibits A, E and H, consisting, respectively, of letters written by appellee upon letterheads of Kansas City Warehouse Service Co., Kansas City Warehouse Service Company and Lionel H. Sanger, the form of which letterheads the appellant desires to call to the Court's attention in their original form.

5. Defendant's Exhibits J, K, L, M, N and O, consisting, respectively, of photostatic copies of appellee's federal income tax returns for the calendar years 1941, 1942, 1946, 1947, 1948 and 1949, all of which returns would be difficult to reproduce accurately by printing.

6. Defendant's Exhibit Q, consisting of a colum-

nar schedule entitled "Sanger's Earnings," which schedule would be difficult to reproduce on one page.

7. Defendant's Exhibit S, consisting of a columnar schedule which likewise would be difficult to reproduce on one printed page.

Appellant and appellee, through their respective attorneys of record, respectfully make application to this Honorable Court for an order that the original exhibits enumerated above (Plaintiff's Exhibits 13, 26 and 32, and Defendant's Exhibits A, E, H, J, K, L, M, N, N, O, Q, and S) be considered by this Honorable Court on this appeal in their original form without printing.

Respectfully submitted,

O'MELVENY & MYERS,

SIDNEY H. WALL,

By /s/ SIDNEY H. WALL,

Attorneys for Appellant.

KENNY & MORRIS,

By /s/ ROBERT S. MORRIS,

Attorneys for Appellee.

/s/ WILLIAM DENMAN,

/s/ WM. ORR,

/s/ WALTER L. POPE,

Judges, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed March 12, 1951.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
ON APPEAL

To: The Honorable Paul P. O'Brien, Clerk of the
Above-Entitled Court:

Appellant above named hereby designates the following portions of the record certified to the above-entitled Court by the Clerk of the District Court, which appellant considers material to the consideration of this appeal:

1. The entire clerk's transcript certified by the Clerk of the District Court, comprising pages 1 to 31, inclusive.

2. The entire reporter's transcript of the proceedings in the District Court on December 19 and 20, 1950, comprising pages 1 to 213, inclusive.

3. That portion only of the reporter's transcript of the proceedings in the District Court on January 5, 1951, commencing with line 1, page 2, and ending on line 2, page 3 (omitting therefrom all that portion thereof commencing with line 3, page 3, and ending on line 17, page 56).

4. The entire reporter's transcript of the oral opinion of the District Court rendered on January 9, 1951, comprising pages 1 to 5, inclusive.

5. All plaintiff's exhibits 1 to 51, inclusive, excepting only that portion of plaintiff's Exhibit 50 (the Pre-Trial Stipulation) comprising pages 11 to 17, inclusive, of said Exhibit 50.

6. All defendant's Exhibits A to U, inclusive.
7. This Designation of Record on Appeal.
8. The Statement of Points filed herewith.

With reference to designations 5 and 6 above, you are advised that appellant and appellee intend to apply to the above-entitled Court for an order directing that certain of the exhibits transmitted by the Clerk of the District Court (to wit: plaintiff's Exhibits 13, 26 and 32, and defendant's Exhibits A, E, H, J, K, L, M, N, O, Q and S) be considered by the above-entitled Court in their original form without printing.

O'MELVENY & MYERS,

SIDNEY H. WALL,

By /s/ SIDNEY H. WALL,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 12, 1951.



